THE INDIA ACTS

AND

THE MADRAS ACTS.

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MADRAS ACTS, 1929.

THE ANNAMALAI UNIVERSITY ACT, 1928.

Act No. I of 1929.

Prefatory Note.—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"The Madras University Act, 1923, foreshadowed the gradual development of new Universities at various convenient centres in the Presidency. During the debates on the Bill which ultimately became the Madras University Act of 1923, Chidambaram was considered as one of the centres likely to grow at an early date into a University Centre. The generous offer of Sir Annamalai Chettiar to transfer the collegiate institutions founded and managed by him at Chidambaram to a University in or near that place and to give further a sum of Rs. 20 lakhs towards the endowment fund of that University has given the Government a unique opportunity to co-operate with private effort in the promotion of research and scholarship by the establishment of an entirely residential and teaching University—a type steadily favoured by the best educational opinion in the country since the report of the Sadler Commission—and one yet unknown in this Presidency.

The object of this Bill is to establish a University of that type—one in which teaching, study, research and active social life will be pursued in an atmosphere congenial to their growth along sound lines, and in which the training given to students would be of primary importance and the examinations which test this training of only subsidiary importance. While this University would like others in this Presidency promote the cause of learning in general, it is hoped that the study of Tamil, Sanskrit and Indian History and other subjects particularly connected with India should be given special importance in the new University. Provision is therefore made for a separate faculty of oriental studies.

The Bill does not provide, as in the case of Madras and the Andhra Universities, that the new University shall have power to affiliate or recognize Colleges. It confines its territorial jurisdiction to an area of ten miles round its Convocation Hall to ensure constant and close association of students and teachers and thus to secure an opportunity for a real corporate life to develop. For the same reason, special emphasis is laid in the Bill on conditions of residence. Moreover, as the collegiate system of organisation is not necessary and may even lead to incongruities in the constitution of a unitary University it is proposed that the University should exercise detailed control on the academic life of students and teachers through its faculties.

The administration of the University will be substantially in the hands of a Syndicate subject to the control of a Senate and a Finance Committee in administrative and financial matters, and of the Academic Council in the academic matters. The Senate and the Academic Council will have representation on the Syndicate. The Senate is to be so constituted as to include not only those who are educationists but also those who are connected with the business and commercial interests so as to

bring it into close touch with the practical life of the Presidency. In consonance with modern tendencies, a considerable elective element is also introduced The Academic Council will consist very largely, though not exclusively, of the teachers of the University and thus the predominance of influence of learning and culture on the course of studies is effectively guaranteed. The Bill provides also for some continuous connexion with the University of Sir Annamalai Chettiyar and his descendants which is only just, having regard to the fact that the creation of the University owes not a little to his generous offer To ensure sound administration of funds, the Government will have representation on the Finance Committee which is given a voice in the determination of financial questions The financial aid given by the Government to the University is placed on a statutory basis, and provision is made whereby provincial finances may partly aid the future expansion of the new University The Bill proceeds in all important matters on the lines of the Acts incorporating the Dacca and Lucknow Universities"—(Statement of Objects and Reasons; *Fort St. George Gazette,* Part IV, dated 22nd Aug 1929).

An Act to establish and incorporate a Teaching and Residential University at Annamalainagar.

WHEREAS it is desirable to establish a Teaching and Residential University for the encouragement of higher education and research in the Tamil districts of the Presidency of Madras;

AND WHEREAS the Hon'ble Diwan Bahadur Sir S. R. M. Annamalai Chettiyar has established and is maintaining Colleges at and near Chidambaram in which higher instruction is imparted in English, Tamil and Sanskrit studies;

AND WHEREAS the said Sir Annamalai Chettiyar has agreed with the Local Government to hand over the said institutions together with all the properties attached thereto and further to give a sum of twenty lakhs of rupees for the purpose of establishing and maintaining at Annamalainagar a Teaching and Residential University wherein he and his heirs shall be entitled to certain powers and privileges;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE ANNAMALAI UNIVERSITY ACT, 1928.

(2) This section shall come into force at once. The rest of this Act shall come into force on such date or dates as the Local Government may, by notification in the *Fort St. George Gazette,* appoint; and different dates may be so appointed for different provisions of this Act.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context:—

(*a*) 'Annamalainagar' means the area described in Schedule;

(*b*) 'Convocation' means any meeting of the University for the conferring of degrees, diplomas or other distinctions;

(*c*) 'Founder' means the Hon'ble Diwan Bahadur Sir S. R. M. Annamalai Chettiyar, and after him his son, Mr. M. A. Muthiah Chettiyar, and for all time after the lives of the said two persons, in respect of every vacancy, any adult male member chosen by the Chancellor from among the members of the said Sir Annamalai Chettiyar's family consisting of his other sons and his descendants tracing their descent through males, and if no such member exists or if one such exists and he does not consent to act as Founder, or if no such member is competent in the opinion of the Chancellor to act as Founder, then and until such a competent member comes into existence and is willing to act, or one who was not competent becomes competent, an adult male member of the said family chosen by the Chancellor from among the said Sir Annamalai Chettiyar's descendants tracing their descent from him through a female or females:

Provided that in any case of a person who traces his descent from the said Sir Annamalai Chettiyar through a female or females, such person shall hold office only till a member of the said Sir Annamalai Chettiyar's family claiming through males is chosen by the Chancellor.

For the purpose of this definition (i) any person adopted into the said family and his descendants shall be deemed to be members of the family, and (ii) no one born in the said family but adopted out of it shall be deemed to be a member thereof except Ramanathan Chettiyar, son of the said Sir Annamalai Chettiyar, but given in adoption to his brother Diwan Bahadur Ramaswami Chettiyar deceased and those tracing descent from the said Ramanathan Chettiyar.

(*d*) 'Hostel' means a place of residence for students of the University maintained or recognized by it in accordance with the provisions of this Act;

(*e*) 'Prescribed' means prescribed by this Act or the statutes or the regulations framed thereunder;

(*f*) 'Teachers' means Professors, Readers, Lecturers, Tutors and such other persons as give instruction to, or take part in the training of, the students of the University in the prescribed manner; and

(*g*) 'University' means the Annamalai University at Annamalainagar constituted under this Act.

Purposes and powers of the University.

3. The purposes and powers of the University shall be the following, namely:—

(*a*) to provide

(i) for instruction in such branches of learning as the University may think fit including professional studies and technology and

(ii) for research and the advancement and dissemination of knowledge;

(*b*) to grant and confer degrees and other academic distinctions to and on persons who shall have

(i) pursued a course of study in the University and shall have passed the examinations of the University in the manner prescribed or

(ii) carried on research under conditions prescribed;

(*c*) to supervise and control the residence and discipline of the students of the University;

(*d*) to establish and maintain hostels, and under prescribed conditions, to recognise hostels not so established or maintained, and to withdraw such recognition;

(*e*) to create such posts as are required for the University and appoint persons thereto;

(*f*) to provide, in the manner prescribed, lectures and instruction for persons who are not pursuing a course of study in the University, and to grant diplomas to them;

(*g*) to confer honorary or *ad eundem* degrees or other distinctions in the manner prescribed;

(*h*) to institute and award fellowships, including travelling fellowships, scholarships, medals and prizes in the manner prescribed;

(*i*) to demand and receive such fees and other charges as may be prescribed;

(*j*) to co-operate with other Universities and authorities for promoting the purposes of this Act;

(*k*) to enter into agreements with other bodies or persons for the purpose of promoting the purposes of this Act including the assuming of the management of any institution under them and the taking over of its properties and liabilities; and

(*l*) to do such other acts and things, whether incidental to the purposes and powers aforesaid or not but not inconsistent therewith, as may be requisite to further the purposes and objects of this Act.

Territorial jurisdiction of University.

4. Save as otherwise provided in this Act, the territorial jurisdiction of the University shall not extend beyond a radius of ten miles from its Convocation Hall which shall be situated in Annamalainagar. Notwithstanding any provision in any other law for the time being in force, no educational institution beyond that limit shall form part of or be recognized by or admitted to the privileges of the University and no such institution within that limit shall similarly form part of or be recognized by or seek admission to any privileges of any other University incorporated by law in British India, and any such recognition granted by any such other University to any such institution within that limit prior to the

commencement of this Act shall be deemed to be withdrawn on the commencement of this Act:

Provided that, if the Local Government so order, nothing in this section shall apply to any institution established or maintained by the University for imparting instruction in agriculture or other technological studies.

University open to all classes and creeds.

5. No person shall be excluded from membership of any of the authorities of the University, or from admission to any degree or course of study, on the sole ground of sex, race, creed, class, caste or political belief, and it shall not be lawful for the University to adopt or impose, on any person, any test whatsoever relating to religious or political belief or profession, in order to entitle him to be admitted thereto as a student or to hold any office or appointment therein or to graduate thereat or to enjoy or exercise any privilege thereof, except where in respect of any particular benefaction accepted by the University such test is made a condition thereof.

Admission to the University.

6. The University may hold examinations for regulating admission thereto or may with the previous sanction of the Governor-General in Council recognize examinations of other Universities or bodies as suitable for the purpose; but it shall not maintain classes for the purpose of preparing students for such admission.

Residence of students.

7. Every person pursuing a course of studies for any examination except the entrance examination and for any degree or diploma of the University except those referred to in clauses (*f*) and (*g*) of section 3 shall reside in a hostel or lodgings maintained or recognized by the University.

Officers of the University.

8. The following shall be the officers of the University, namely:—

(1) The Chancellor,

(2) The Founder,

(3) The Pro-Chancellor,

(4) The Vice-Chancellor,

(5) The Registrar,

(6) The Deans of Faculties, and

(7) Such other persons as may be declared by the Statutes to be officers of the University.

The Chancellor. His powers.

9. (1) The Governor of Fort St. George shall be the Chancellor of the University. He shall by virtue of his office be the head of the University and shall, when present, preside at meetings of the Senate and at Convocations.

(2) The Chancellor shall exercise such powers as may be conferred on him under the provisions of this Act.

(3) The Chancellor shall be entitled to delegate all or any of his functions to the Pro-Chancellor.

The Pro-Chancellor. His powers.

10. (1) The Founder shall be the Pro-Chancellor of the University.

(2) The Pro-Chancellor shall in the absence of the Chancellor preside at meetings of the Senate and at Convocations and shall also exercise such other powers as may be conferred on him under the provisions of this Act.

(3) If for any reason the office of the Pro-Chancellor is vacant, the functions of the said office shall be carried on by the Chancellor or by any person authorized by him to do so.

The Founder. His powers.

11. (1) The Founder shall hold office for life unless otherwise expressly provided for in this Act.

(2) The Founder may require the Vice-Chancellor to furnish him with information and all papers or copies thereof relating to any matter concerning the University. The Founder may also request further consideration of the matter by the authorities or officers concerned or place his views thereon before the Chancellor for his consideration, or may do both.

(3) The Founder shall also exercise such other privileges as are conferred on him under the provisions of this Act.

The Vice-Chancellor.

12. (1) The Vice-Chancellor shall be appointed by the Chancellor from a panel of three persons recommended by the Founder. He shall, in the absence of special orders by the Chancellor prescribing a shorter period, hold office for a term of three years from the date of the notification of his appointment in the *Fort St. George Gazette.*

(2) The Vice-Chancellor may either be an honorary officer or be paid such salary as may be prescribed.

(3) When any vacancy occurs in the office of Vice-Chancellor, the Syndicate shall, as soon as possible, appoint one of its own members to exercise the powers and perform the duties of the Vice-Chancellor during the continuance of the vacancy.

Powers and duties of the Vice-Chancellor.

13. (1) The Vice-Chancellor shall be the principal executive officer of the University and shall, in the absence of the Chancellor and Pro-Chancellor, preside at meetings of the Senate and at Convocations. He shall *ex officio* be a member and the Chairman of the Academic Council and of the Syndicate.

(2) The Vice-Chancellor shall in the manner prescribed convene meetings of the Senate, the Academic Council and the Syndicate.

(3) In any emergency which in the opinion of the Vice-Chancellor requires that immediate action should be taken, he may take such action and shall immediately thereafter report his action to the authority or officer which or who would have ordinarily dealt with the matter and such authority or officer may confirm, alter or quash such action.

(4) The Vice-Chancellor shall have the power to appoint the clerical staff and other servants of the University.

(5) The Vice-Chancellor shall exercise such other powers as may be prescribed.

14. The following shall be the authorities of the University, namely:— Authorities of the University.

(1) The Senate,
(2) The Academic Council,
(3) The Faculties,
(4) The Boards of Studies,
(5) The Syndicate,
(6) The Finance Committee (for the period fixed under this Act).
(7) The Board of Selection,
(8) Such other bodies as may be declared by the Statutes to be authorities of the University.

15. The Senate shall consist of the following persons, namely:— Constitution of the Senate

CLASS I—EX-OFFICIO MEMBERS.

(1) The Chancellor,
(2) The Pro-Chancellor,
(3) The Vice-Chancellor,
(4) The Director of Public Instruction, Madras,
(5) The Chairman of the Chidambaram Municipal Council,
(6) The President of the District Board, South Arcot,
(7) Heads of departments of studies in the University,
(8) The Vice-Chancellors of the Madras and Andhra Universities,
(9) The Collector of South Arcot,
(10) The Advocate-General, Madras,
(11) Members of the Syndicate who are not otherwise members of the Senate,
(12) The Diwan of Pudukottai.

CLASS II—LIFE MEMBERS.

(1) Ex-Vice-Chancellors of the University.

(2) All persons who make a donation of not less than twenty-five thousand rupees to and for all or any of the purposes of the University, and agree to such terms as the Syndicate may impose for the management of the said amount. In case the donor is a corporate body or a firm or a joint family or an association, the individual who shall be entitled to this life membership shall be determined in the manner prescribed.

CLASS III—OTHER MEMBERS.

(1) Twelve members elected from among themselves by graduates of the university registered in the manner prescribed, according to the principle of proportional representation by means of the single transferable vote,

Provided that during the first ten years after this section comes into force, the twelve members shall be elected according to the same principle by

(i) the graduates of the University,

(ii) the graduates of the University of Madras from the Sri Minakshi College at Chidambaram, and

(iii) the graduates of not less than seven years' standing of the University of Madras, other than those from the Sri Minakshi College at Chidambaram, residing in the manner prescribed in the districts of Madras, Chingleput, North Arcot, South Arcot, Salem, Coimbatore, the Nilgiris, Tanjore, Trichinopoly, Madura, Ramnad and Tinnevelly and in the State of Pudukkottai,

(2) Four members elected by the Academic Council from among its members according to the principle of proportional representation by means of the single transferable vote,

(3) Five members elected by the Madras Legislative Council from among its members according to the principle of proportional representation by means of the single transferable vote,

(4) Such number of members not exceeding six, as the Chancellor may fix, to be elected by the donors of sums of not less than ten thousand rupees each to and for all or any of the purposes of the University and agree to such terms as the Syndicate may impose for the management of the said amounts,

(5) Eight members nominated by the Chancellor at least three of whom shall be representatives of depressed, backward or minority classes not otherwise adequately represented,

(6) Four members nominated by the Founder,

Provided that, if the office of the Founder is vacant on the date on which the nomination is to be made, and there is no likelihood in the opinion of the Chancellor of the vacancy being filled up within six months from that date, the Chancellor shall nominate the said four members,

(7) One member elected by the members of the District Board, South Arcot district, from among themselves,

(8) One member elected by the Municipal Councillors of the South Arcot district other than the Municipal Councillors of Chidambaram from among themselves,

(9) One member elected by the Municipal Councillors of Chidambaram from among themselves,

(10) One member elected by the members of the Sri Nandanar Kalvi Khazhagam, Chidambaram, from among themselves,

(11) One member elected by the general body of the Muhammadan Educational Association of Southern India from among its members,

(12) One member elected from among themselves by those engaged in teaching in any manner, on the staff of the Sanskrit College, Tiruvadi, the Rameswaram Sanskrit Patasala, Madura, and the Sri Minakshi Sanskrit College, Chidambaram,

(13) One member elected from among themselves by the members of the Madura Tamil Sangam,

(14) One member elected from among themselves by the members of the Tanjore Karanthai Tamil Sangam and the teaching staff of the Sri Minakshi Tamil College, Chidambaram,

(15) One member elected by the Southern India Chamber of Commerce and one by the Madras Chamber of Commerce,

(16) One member elected by the Madras Landholders' Association.

Powers and duties of the Senate.

16. The Senate shall be the supreme governing body of the University and shall have the following powers, namely:—

(1) to make statutes and amend or repeal the same,

(2) to consider and pass resolutions on the annual reports and the annual accounts which resolutions shall be communicated to the Syndicate who shall take action in accordance therewith,

(3) to consider and pass resolutions on the annual financial estimates which resolutions shall, after the period of tenure of the Finance Committee, be communicated to the Syndicate who shall take action in accordance therewith,

(4) to exercise such other powers and perform such other duties as may be conferred or imposed upon it by this Act or the statutes, and

(5) to do all acts and things necessary to give effect to the provisions of this Act.

Constitution of the Academic Council.

17. The Academic Council shall consist of the following persons, namely:—

CLASS I—EX-OFFICIO MEMBERS.

(1) The Vice-Chancellor,
(2) The Director of Public Instruction, Madras,
(3) The Professors and Readers of the University,
(4) The Chairman of the Boards of Studies,
(5) The Members of the Syndicate who are not otherwise members of the Academic Council.

CLASS II—OTHER MEMBERS.

(1) Ten members, of whom not less than five shall be teachers other than Professors and Readers, elected by such teachers,

(2) Five members elected by the Senate from among its members, provided that no one who is already a member of the Academic Council shall be eligible for election under this item.

Powers and duties of the Academic Council.

18. The Academic Council shall have the control and regulation of residence, teaching and examinations in the University and the maintenance of the standards thereof, shall have the following powers and shall perform the following duties, namely:—

(*a*) to make proposals to the Syndicate for the institution of professorships, readerships, lectureships or other teaching posts,

(*b*) to make regulations for purposes hereinafter specified,

(*c*) to make recommendations to the Syndicate for the recognition of teachers qualified to give instruction in hostels not maintained by the University,

(*d*) to formulate, modify or revise, subject to the control of the Senate, schemes for the constitution or reconstitution of faculties and departments of studies, and

(*e*) to do such other things and perform such other duties as may be prescribed by the statutes.

The Faculties.

19. (1) The University shall include Faculties of Arts, Science, Technology and Oriental Studies and such other Faculties as may be prescribed and each such Faculty shall be constituted in the manner prescribed.

(2) Each Faculty shall have a Dean. He shall be elected by the Faculty from among the heads of departments of the Faculty and shall be responsible for the due observance of the statutes and regulations relating to the Faculty. He shall hold office for such period and subject to such conditions as may be prescribed by the statutes.

(3) Each Faculty shall comprise such departments of study as may be prescribed by the regulations and shall, subject to the control of the Academic Council, have charge of the teaching, courses of study and research work in such departments. The head of every department of study shall be the professor of that department, or if there is no professor, the Reader. If there is more than one professor or more than one Reader in a department, as the case may be, the Vice-Chancellor shall appoint such professor or Reader as he thinks fit to be the head of the department. The head of the department shall be responsible to the Dean for the organization of the teaching in that department.

Boards of Studies.

20. The number, constitution and duties of the Boards of Studies shall be such as may be prescribed.

21. The Syndicate shall consist of the following persons, namely:— Constitution of the Syndicate.

CLASS I—EX-OFFICIO MEMBERS.

(1) The Vice-Chancellor,

(2) The Director of Public Instruction, Madras,

(3) The Deans of Faculties.

CLASS II—OTHER MEMBERS.

(1) Three members elected by the Senate from among its members,

(2) One member elected by the Academic Council from among its members,

(3) Two members nominated by the Chancellor.

(4) Two members nominated by the Founder, provided that, if the office of the Founder is vacant on the date on which the nomination is to be made and there is in the opinion of the Chancellor no likelihood of the vacancy being filled up within one month from that date the Chancellor shall nominate the said two members.

22. The Syndicate shall have the following powers and perform the following duties, namely:— Powers and duties of the Syndicate.

(*a*) to control and administer the property and the funds of the University,

(*b*) to direct the form, custody and use of the common seal of the University,

(*c*) to suspend or dismiss the Registrar, the teachers, the clerical staff and other servants of the University for sufficient cause and to define their duties and the conditions of their service,

(*d*) to accept on behalf of the University bequests, donations and transfers of any movable or immovable properties or the management thereof,

(*e*) to arrange for the holding of and publish the results of the University examinations and in the prescribed manner to appoint examiners and cancel their appointment,

(*f*) to regulate and determine all matters concerning the University in accordance with this Act and the statutes and regulations,

(*g*) to institute, subject to the control of the Senate, and abolish or suspend on the advice of the Academic Council, professorships and other teaching posts,

(*h*) to refer any matter to the Academic Council, a Faculty or a Board of Studies for consideration and report.

(*i*) to draft such statutes and regulations as may from time to time be necessary and to submit them to the Senate and the Academic Council respectively for consideration,

(*j*) to dispense, subject to statutes made in this behalf, with a strict compliance with the regulations of the University in special cases,

(*k*) to make standing orders in such manner and on such matters as may be prescribed, and

(*l*) to do such other things and perform such other duties as may be prescribed.

Constitution of the Finance Committee.

23. The Finance Committee shall consist of the following persons, namely:—

(1) The Secretary to the Government of Madras in charge of Finance,

(2) The Founder, and, in case the office is vacant, any person nominated by the Chancellor to do the duties of the Founder under this section, during the continuance of the vacancy,

(3) The Vice-Chancellor,

(4) One member elected by the Senate from among its members; provided that no one who is already a member of the Syndicate shall be eligible for election under this clause.

Powers and duties of the Finance Committee.

24. (1) The Syndicate shall, in the manner prescribed, frame the financial estimates of the University and place the same before the Finance Committee.

(2) The Finance Committee shall then scrutinize the said estimates and shall be entitled to make such modifications therein as it considers necessary.

(3) The said estimates as modified by the Finance Committee shall then be placed before the Senate which may assent or refuse its assent to the same or may omit or alter any of the items therein.

(4) (i) (*a*) All modifications made by the Senate in the said estimates which have not the effect of increasing the income,

(*b*) and all proposals, involving any expenditure, originated by the Senate apart from such estimates,

shall be placed before the Finance Committee for its consideration.

(ii) All points of difference between the said Committee and the Senate in respect of the matters specified in clause (i) shall be placed before the Chancellor and his decision thereon shall be final.

The Board of Selection—Its powers.

25. (1) The Board of Selection shall consist of the following persons, namely:—

(*a*) One member nominated by the Chancellor,

(*b*) The Founder and, in case the office is vacant, any person nominated by the Chancellor to do the duty of the Founder under this section during the continuance of the vacancy,

(*c*) the Vice-Chancellor,

(*d*) One member elected by the Syndicate from among its members, and

(*e*) One member elected by the Senate from among its members.

(2) The Board of Selection shall have the power to appoint the Teachers and the Registrar of the University.

Annual accounts.

26. (1) The annual accounts of the University shall be prepared by the Syndicate in the manner prescribed and shall be submitted to such examination and audit as the Local Government may direct.

(2) The accounts when so examined and audited shall be published by the Syndicate in the *Fort St. George Gazette* and copies thereof shall, together with copies of the report of such examination and audit, be submitted to the Senate, the Finance Committee and the Local Government.

The University

27. The Chancellor, Pro-Chancellor and Vice-Chancellor of the University and the members of the Senate, the Academic Council and the Syndicate shall constitute a body corporate by the name of the Annamalai University of Annamalainagar and shall have perpetual succession and a common seal and shall sue and be sued by that name.

Visitor.

28. (1) The Governor-General shall be the Visitor of the University.

(2) The Visitor shall have the right to cause an inspection or an enquiry to be made in respect of any matter, institution or property connected with the University by such person or persons as he may appoint in that behalf. The Visitor shall in every case give notice to the University of his intention to cause such inspection or enquiry to be made and the University shall be entitled to be represented thereat.

(3) The Visitor may address the Chancellor with reference to the results of such inspection or inquiry and the Chancellor shall communicate to the Senate and to the Syndicate the views of the Visitor and may, after ascertaining the opinion of the Senate and the Syndicate thereon, advise the University upon the action to be taken.

(4) The Syndicate shall report to the Chancellor for communication to the Visitor such action, if any, as it is proposed to take or has been taken upon the results of such inspection or enquiry. Such report shall be accompanied by the opinion of the Senate thereon and shall be submitted within such time as the Chancellor may direct.

(5) Where the Senate or the Syndicate does not within a reasonable time take action to the satisfaction of the Chancellor,

the Chancellor may, after considering any explanation furnished or representation made by the Senate or the Syndicate, issue such directions as he may think fit and the Senate and the Syndicate shall comply with such directions. In the event of the Senate or the Syndicate not complying with such directions within such time as may be fixed in that behalf by the Chancellor, he shall have power to appoint some person or body to carry them out and make such order as to the expenses thereof as he deems fit to make.

Statutes.

29. Subject to the provisions of this Act, the statutes may provide for all or any of the following, namely:—

(*a*) the constitution, powers and duties of the authorities of the University;

(*b*) the establishment and maintenance of hostels by the University;

(*c*) the conditions of recognition of hostels not maintained by the University;

(*d*) the powers of the officers of the University and in the case of officers other than the Chancellor and Pro-Chancellor their duties;

(*e*) the conditions of service of the Vice-Chancellor and the Registrar;

(*f*) the holding of Convocations to confer degrees;

(*g*) the conferment of honorary and *ad cundem* degrees and other distinctions;

(*h*) the institution and award of fellowships, including travelling fellowships, scholarships, medals and prizes;

(*i*) the classification, emoluments and mode of appointment of the teachers of the University;

(*j*) the institution of a provident fund for the benefit of the officers of the University (other than the Chancellor, the Founder, the Pro-Chancellor and the Vice-Chancellor), its teachers, clerical staff and servants;

(*k*) the maintenance of a register of registered graduates;

(*l*) all matters which under this Act may be prescribed by the statutes; and

(*m*) all other matters and things save those in respect of which regulations can be made, which are within the purposes of this Act, whether incidental to those specified above or not.

Statutes how made.

30. (1) The Senate may take into consideration the draft of any statute either of its own motion or on the submission thereof by the Syndicate.

(2) If the proposed statute would affect any officer or authority of the University—

(a) where the Senate acts on its own motion, the opinion of the Syndicate and of the officer or authority affected shall be taken into consideration by the Senate before the statute is passed; and

(b) where the Senate acts on the submission of a draft thereto by the Syndicate, the Senate shall not proceed to consider the draft unless the Syndicate has given an opportunity to the officer or authority affected to express his or its opinion thereon and places such opinion, if any, before the Senate for its consideration.

(3) When any statute has been passed by the Senate or a draft proposed by the Syndicate has been rejected, the statute or the draft, as the case may be, shall be submitted to the Chancellor together with the opinions, if any, referred to in sub-section (2) and the Chancellor may refer the statute or draft back to the Senate for further consideration.

(4) A statute passed by the Senate shall have no validity until it has been assented to by the Chancellor.

31. Subject to the provisions of this Act and the statutes, the regulations may provide for all or any of the following matters, namely:— Regulations.

(a) the admission of students to and the levy of fees therefor by the University;

(b) the conditions under which any person may be admitted to the examinations, degrees and diplomas of the University;

(c) the conditions of residence of the persons referred to in section 7 and the levy of fees for residence and tutorial instruction in hostels maintained by the University;

(d) the number and qualifications of professors, readers, lecturers and other teachers in the University;

(e) the fees to be charged for courses of teaching given by teachers of the University, for tutorial and supplementary instruction given by the University, for admission to the examinations, degrees and diplomas of the University and for the registration of graduates;

(f) the conditions subject to which persons may be recognized as qualified to give instruction in colleges, hostels and lodgings not maintained by the University;

(g) the appointment and duties of examiners and their emoluments;

(h) the conduct of examinations;

(i) all other matters which by this Act or by the statutes may be provided by the regulations; and

(*j*) all matters incidental to those specified in clauses (*a*) to (*i*).

Regulations how made.

32. Regulations may be made by the Academic Council on its own motion or on the submission of a draft to it by the Syndicate provided that in the former case before a regulation is passed the opinion of the Syndicate thereon shall be obtained and taken into consideration by the Academic Council.

All regulations shall have effect from such date as the Academic Council may appoint in that behalf; but every regulation so made shall be submitted as soon as may be to the Senate who shall consider it at its next meeting or at any other meeting to which it may adjourn the consideration thereof. The Senate shall have power, by resolution passed by a majority of not less than two-thirds of the members present at such meeting, to cancel or modify any such regulation.

Period of office.

33. (1) Save as otherwise provided, the authorities and other bodies connected with the University shall be reconstituted every three years, and a member of every such authority or body shall except in the case of ex-officio or life members hold office as member thereof from the date of his election or nomination thereto up to the date of the next reconstitution.

(2) Any vacancy in the said membership occurring before the said reconstitution, shall be filled up as soon as conveniently may be by the person or body who appointed or elected the member whose place has become vacant and the person so appointed or elected shall be a member of such authority or body only for the residue of the term for which the person whose place he has filled would have been a member.

(3) Any person nominated or elected in his capacity as a member of a particular body or the holder of a particular appointment shall if he ceases to be a member of that body or the holder of that appointment as the case may be, for a period of more than three months or if he goes on leave for a period of not less than six months cease to be a member of the authority or the body of the University concerned.

Validity of proceedings of the University bodies.

34. No act or proceeding of any authority or other body of the University shall be deemed to be invalid by reason only of some defect in the constitution of the University or of the said authority or body, or of the existence of any vacancy in the said authority or body, or of the invalidity of any election connected therewith, or of the disqualification of any member thereof at the time of or subsequent to his election or nomination thereto.

Disqualification for membership.

35. No person shall be qualified for election or nomination as a member of any of the authorities of the University or of any body connected therewith, or for appointment as an officer, thereof if at the time of election, nomination or appointment, he

(*a*) is of unsound mind, deaf-mute or a leper, or

(*b*) is an uncertificated bankrupt or undischarged insolvent, or

(*c*) has been convicted by a court of law of an offence involving moral delinquency.

In case of dispute or doubt, the Chancellor shall determine whether a person is disqualified under this section and his decision shall be final.

Removal from membership of the University.

36. (1) The Senate may remove any person from membership of any of the authorities of the University or of any body connected therewith or from any of the offices specified in items (5), (6) and (7) of section 8—

(*a*) if he has been convicted by a court of law of what in the opinion of the Senate is an offence involving moral delinquency,

(*b*) if he becomes of unsound mind or a deaf-mute or a leper, or

(*c*) if he applies to be adjudicated or is adjudicated a bankrupt or insolvent.

(2) The Senate may for the reason specified in clause (*a*) of sub-section (1) withdraw any degree or diploma or any other distinction conferred or granted by the University.

(3) The Senate shall not take any action under clause (*a*) of sub-section (1) or under sub-section (2) except on the recommendation of not less than two-thirds of the members of the Syndicate.

Disputes as to election, nomination or membership of University authority or body.

37. If any dispute arises whether any person has been duly elected or nominated as or is entitled to be a member of any authority or body of the University, the question shall be referred to the Chancellor whose decision thereon shall be final.

Constitution of committees.

38. All the authorities of the University shall have power to appoint committees and to delegate to them such of their powers as they deem fit; such committees may include persons who are not members of the authority concerned:

Provided that the number of persons so included in any committee shall not exceed one-fifth of the total number of that committee.

Provident Fund.

39. Where any provident fund has been instituted by the University for the benefit of its officers, teachers, clerical staff or servants, the Governor-General in Council may declare that the provisions of the Provident Funds Act, 1925, shall apply to such fund as if it were a Government Provident Fund.

Transfer of the colleges and of their properties to the University.

40. On the commencement of this Act, the institutions known as the Sri Minakshi College, the Sri Minakshi Tamil College and the Sri Minakshi Sanskrit College situated at Chidambaram and being maintained by Diwan Bahadur Sir S. R. M. Annamalai Chettiyar shall cease to exist as separate entities and shall become part of the University and all rights, powers and privileges of the said institutions and all property moveable and immoveable thereof shall vest in the University and shall be applied to the objects and purposes for which the University is incorporated.

Permanent Endowment Fund.

41. (i) The University shall have a fund called the Permanent Endowment Fund which it shall invest and keep invested in securities issued or guaranteed by the Government of India or by Local Governments in British India.

(ii) The said Permanent Endowment Fund shall consist of—

(a) the sum of twenty lakhs of rupees given by the Founder, the Honourable Diwan Bahadur Sir S. R. M. Annamalai Chettiyar;

(b) the sum of twenty-seven lakhs of rupees given to it by the Local Government; and

(c) any contributions to this fund made by the Local Government, the Government of India, any local or other public body, the Founder or others.

General Fund

42. The University shall also have a fund called the General Fund which shall consist of—

(a) fees and income from endowments including the Permanent Endowment Fund, and

(b) any contributions made to this fund by the Local Government, the Government of India, any local or other public body, the Founder or others.

Contribution by Government to the University.

43. The Local Government—

(1) shall contribute to the general fund annually a sum of one and a half lakhs of rupees, and

(2) subject to such conditions as may be agreed upon between them and the University—

(a) shall give for the buildings and equipment of the University a sum of seven and a half lakhs of rupees, and

(b) may contribute, from time to time, such further sums as they deem fit to contribute to the said fund or towards such buildings or equipment.

Completion of Madras University courses.

44. Notwithstanding anything contained in this Act or the regulations any student of the University who was pursuing a course of study for any examination of the University of Madras shall be permitted to complete that course and the

University shall hold or arrange with the University of Madras for holding for such students examinations in accordance with the curricula of studies of that University for such period as may be prescribed and notwithstanding anything contained in the Madras University Act, 1923, or the Statutes, Ordinances and Regulations thereunder, such students may be admitted to the appropriate examinations of that University.

45. (1) At any time after the passing of this Act the Vice-Chancellor may with the previous approval of the Chancellor, take such action consistent as far as may be with the provisions of this Act and the statutes as he may think necessary for the purpose of bringing the University into being, and for that purpose may exercise any power which by this Act or the statutes is to be conferred on any officer or authority of the University. **Transitory provisions.**

(2) At any time after the passing of this Act and until such time as the authorities of the University shall have been duly constituted, the Registrar and the teachers of the University shall be appointed by the Chancellor after considering the recommendations of a committee consisting of the Pro-Chancellor, the Vice-Chancellor, and such other person or persons, if any, as the Chancellor thinks fit to associate with them.

(3) Any appointment made under sub-section (2) shall be for such period and on such conditions as the appointing authority thinks fit: provided that no such appointment shall be made until financial provision has been made therefor.

(4) The first statutes and regulations shall be made by a committee consisting of the Vice-Chancellor as Chairman, and two or more persons nominated thereto by the Chancellor and shall come into force after being approved by the Chancellor, on such date or dates as the Chancellor may appoint in that behalf.

(5) The salary, if any, of the first Vice-Chancellor shall be fixed by the Chancellor.

46. The Chancellor shall have power to take any action necessary to remove any difficulty that may arise in first giving effect to the provisions of this Act. **Removal of difficulties at the commencement of the Act.**

47. This section, item (6) of section 14, and sections 23 and 24 shall cease to be part of this Act on the termination of ten years from the date on which section 23 comes into force. **Duration of certain sections of the Act.**

SCHEDULE.

The whole of the Revenue village of Tiruvakkulam and portion of the Revenue village of C. Kottangudi and Resurvey No. 102 of the Revenue village of Usuppur in the Chidambaram taluk in the South Arcot district, bounded on the north by the Natarajapuram

road commencing from the South Indian Railway level crossing situated just to the east of the Chidambaram Municipal toll-gate, on the east and south by the Uppanar and on the west by the South Indian Railway line and lands belonging to the South Indian Railway Company, Limited; and Resurvey Nos. 65 to 68 and 105 to 144 of the abovementioned Revenue village of Usuppur.

THE INDIAN FISHERIES (MADRAS AMENDMENT) ACT, 1927.

ACT NO. II OF 1929.

PREFATORY NOTE—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"The Bill contains three amendments to the Indian Fisheries Act (IV of 1897). The first of these proposed amendments which relates to section 6 (3) is intended to give wider powers to the Local Government to regulate the means and modes of using contrivances to take fish so as to secure especially protection of immature food fish at particular seasons and times as it is apprehended that this indiscriminate capture will lead to depletion of fish in public waters.

2. The second amendment is proposed with a view to preventing fishing by poachers. The fisheries in several waters of the Presidency are the property of the Crown and are gradually being improved by the introduction at considerable cost of better kinds of fish The right to collect the fish is annually leased out by Government. Section 6 (4) of the Act contemplates only a total prohibition of fishing for a period not exceeding two years at a time. Any notification issued under this section will therefore exclude even the lessees from enjoying the rights under leases granted to them It is therefore proposed to regulate fishing by the grant of a license or lease while securing total prohibition against poachers

3. The third amendment proposed in the Bill is in regard to the recovery of fishery rentals from defaulting lessees These rentals are now recovered under the Madras Revenue Recovery Act of 1864. As the legality of proceeding under that Act has been questioned, it has been found necessary to provide specifically that all fishery rental and fishing license fees shall be recoverable as if they were arrears of land revenue"—Statement of Objects and Reasons, *Fort St George Gazette,* Part IV, p 69

[*2nd December,* 1928.]

An Act to amend the Indian Fisheries Act, 1897, *in its application to the Presidency of Madras.*

Preamble. WHEREAS it is expedient to amend the Indian Fisheries Act, 1897, in its application to the Presidency of Madras for the purposes hereinafter appearing;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act; it is hereby enacted as follows:—

1. (1) This Act may be called THE INDIAN FISHERIES (MADRAS AMENDMENT) ACT, 1927. — Short title and extent.

(2) It extends to the whole of the Presidency of Madras.

2. In sub-section (3) of section 6 of the Indian Fisheries Act, 1897 (hereinafter referred to as the said Act)— — Amendment of section 6, Act IV of 1897.

(i) after the words "prohibit or regulate" the words "either permanently or for a time or for specified seasons only" shall be inserted, and

(ii) for clause (*c*) the following clause shall be substituted, namely:—

"(*c*) the dimension and kind of the contrivances to be used for taking fish generally or any specified kind of fish and the modes of using such contrivances."

3. For sub-section (4) of section 6 of the said Act, the following sub-section shall be substituted, namely:— — Amendment of section 6, Act IV of 1897

"(4) Such rules may also prohibit all fishing in any specified water except under a lease or license granted by Government and in accordance with such conditions as may be specified in such lease or licence:

"Provided that no rule shall be made under this sub-section to prohibit sea fishery other than pearl fishery or chank fishery unless, after previous publication under sub-section (6) of this section, it has been laid in draft before the Legislative Council, and has been approved by a resolution of the Legislative Council either with or without modification or addition; but upon such approval being given the rule may be issued in the form in which it has been so approved."

4. After section 7 of the said Act, the following section shall be added, namely:— — Addition of new section 8 to Act IV of 1897.

"8. All rents, fees and other moneys payable to Government on account of fishery leases and licences granted by them may be recovered in like manner as if they were arrears of land revenue." — Recovery of rents, fees and other moneys payable to Government.

THE JAINA SUCCESSION ACT, 1928.

ACT No. III OF 1929.

PREFATORY NOTE—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

The Jains in South Kanara district are about 9,000 in number and are rich landowners. In matters of faith and religious practices they con-

form to the Jains in other parts of India They belong to the Digambara Sect. Their shrines situated in Karkal, Venur, Mudabidri and other places are worshipped by all classes of Jains in India and are visited by pilgrims in large numbers annually. In matters of social usages, they conform to those prevailing among the higher classes of Hindus governed by the Mitakshara Law of Inheritance. The thread investment ceremony, the pouring of water at the time of the 'Dhara' or marriage ceremony by the parents, the rules of pollution on the occasion of birth and death are observed as in Makkalasanthana system. The Jain temples are officiated by Jain priests called 'Indars' and they preside at the marriage and other ceremonies. They inter-marry with Jains in other parts of India

Yet, by a strange irony of fate, while they have everything in common with the Jains in other parts of India who are governed by the rules of Hindu Law and who observe the Makkalasanthana system of inheritance to their property, the Jains in South Kanara are governed by the Aliyasanthana system of inheritance by which the line of descent to property is traced to females and whereby the property devolves on sisters and nephews rather than on sons and daughters, as found among Bunts, Billawars and other communities Even here the practice is not uniform. The 'Indras' or the priestly class are followers of the Makkalasanthana Law and some of the chief families as 'Ajlar' and the Dharmastal Heggade also follow it It is futile to ascertain how these incongruities arose and no sufficient materials are available to make researches into it. But the disabilities arising from the application of the Aliyasanthana system of inheritance to Jains who have very little in common with the other classes governed by Aliyasanthana Law are keenly felt, the more so when marriage among them is a recognised institution but is not recognised by law as conferring the right of inheritance from father to son. The Malabar Marriage Act, 1896, though it included all Hindus governed by Aliyasanthana Law, has failed to give any relief to the Jains, since the registration of marriages which is made compulsory under the Act before the marriage is legally recognised, is strongly resented by the Jains and is opposed to the social custom which recognizes it and governs all their relations Even among Marumakkatayam and other followers of the Malabar Marriage Act, the Act is more or less a dead letter as very few marriages have been registered though the Act was passed more than several decades ago The present measure, therefore, takes for granted the institution of marriage as it exists and accepts it as being sufficient to confer rights of inheritance. The attempt is to bring into a line with the right of inheritance enjoyed by Jains in other parts of India who follow the Mitakshara Law of Inheritance under the Hindu Law. It is not attempted to revolutionize the whole system of Aliyasanthana inheritance and the tarwad or family rights are not in any way touched upon and are kept intact, since it will affect the vested rights The Bill affects only the self-acquired or the tarwad properties of the last surviving owner who could effectively dispose of it by will or testament.

It may be relevant to point out that the Legislature has interfered to give redress in similar instances In the case of Mappillas of South Kanara who have a recognized system of marriage under Mahomedan Law, but among whom the Marumakkatayam or Aliyasanthana system of marriage prevailed, the Legislature by Act I of 1918 gave the necessary relief by confining its operation to self-acquired properties and made the properties descendable to children instead of tarwad members, i.e., to sisters and sisters' children The present Bill attempts no more than what has been done under Act I of 1918 and is practically framed on the same lines by giving legal sanction to the marriage prevalent and recognizing the issue of such marriages entitling them to inherit the property

The matter was brought to the notice of Government by a memorial, dated 29th May, 1918, through the Collector of the district and the Government, after obtaining the opinions of High Court Judges, the Advocate-General and the District Judge of South Kanara, who all favourably viewed it, gave permission by G.O. No. 944 (Home-Judicial), dated 29th April, 1919, to introduce a Bill in the local Legislative Council by a non-official member. Leave to introduce was given to this very Bill by the last Council to Mr. Dharmastal Heggade, a Jain himself, but for lack of time it lapsed There are only five sections; sections 1 and 4 require no comment and section 5 has been sufficiently dealt with.—Statement of Objects and Reasons, *Fort St. George Gazette*, Part IV, p. 87, 20th September, 1927.

[14*th February*, 1929.]

An Act to amend and define the Law of Intestate succession among Jainas governed by the Aliyasantana Law of Inheritance.

WHEREAS it is expedient to amend and define the law relating to intestate succession among Jainas governed by the Aliyasantana Law of Inheritance and whereas the previous sanction of the Governor-General has been obtained under section 80-A of the Government of India Act; it is enacted as follows:— Preamble.

1. This Act may be called THE JAINA SUCCESSION ACT, 1928. Short title.

2. It extends to the whole of the Presidency of Madras. Local extent.

3. It applies to Jainas domiciled in the Presidency of Madras who are governed by the Aliyasantana Law of Inheritance and also, in respect of immovable property situated within the Presidency of Madras, to Jainas domiciled outside the said Presidency who are so governed. Jainas to whom the Act is applicable.

4. A person is deemed to die intestate in respect of all property, of which he has not made a testamentary disposition which is capable of taking effect. Definition of intestate property.

Explanation.—Property in this section does not include tarwad (kutumba) property, unless the person dying intestate was exclusively entitled to it.

5. Such property shall, notwithstanding any law or custom to the contrary, devolve upon his heirs in the order and according to the rules of the Mitakshara Law of Inheritance, under the Hindu Law as administered in the Presidency of Madras. Such property, on devolution shall be subject to all the incidents of the Mitakshara Law of Inheritance as administered in the Presidency of Madras. Application of Mitakshara Law of Inheritance to Jainas.

6. Notwithstanding any law to the contrary, all forms of marriages among such Jainas recognized by custom as valid shall be legal and valid for the purposes of this Act. Validation of customary marriages among Jainas

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THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1929.

ACT No. IV OF 1929.

[*5th April*, 1929.]

An Act to amend the Andhra University Act, 1925.

Preamble.

WHEREAS it is expedient to amend the Andhra University Act, 1925; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1929.

(2) It shall come into force on such date as the Local Government may, by notification in the *Fort St. George Gazette,* appoint.

Amendment of section 3 of Madras Act II of 1926.

2. In sub-section (2) of section 3 of the Andhra University Act, 1925, for the word 'Bezwada,' the word 'Vizagapatam' shall be substituted.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS (AMENDMENT) ACT, 1929.

ACT No. V OF 1929.

PREFATORY NOTE.—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"The system of dedication of young girls to Hindu temples might properly have originated with the noblest and highest of motives; but now, seeing that it has degenerated into something highly objectionable and that the majority of these girls take to a life of impurity as is so very well known to the general public, it is necessary that the sanction of our temple authorities to such a practice of dedication which breeds immorality, promiscuity and irresponsibility in both men and women, be done away with in the interest of the individuals and the nation at large, and thus the public be disabused of the notion that our religion encourages immorality in either man or woman, and that the services of these women in any way form an essential part of the worship in the temples. It may here be stated that the progressive and enlightened State of Mysore has abolished the practice of dedication to the temples even as early as 1909, as is evidenced in G.O. No. 1560-71-Mux F 84-05-3, dated Bangalore, 10th April, 1909."—Statement of Objects and Reasons, *Fort St George Gazette,* Part IV, 25th September, 1928.

The Bill was referred to a Select Committee.

The Select Committee said:—

"The object of the Act is to discourage the dedication of girls as Devadasis for service in Hindu temples, by freeing the lands, if any, held by them for such service, from the condition of service and making them the owners thereof, and thereby removing an important inducement for the perpetuation of the system of dedication. The Bill as introduced into the Council sought to effect this enfranchisement by adding a proviso to section 44 of the Madras Religious Endowments Act, requiring that all grants of land held by Devadasis on condition of service be enfranchised in favour of the present holders thereof and that they be not required to

perform any service in temples The Select Committee consider that such a bald provision would be unworkable in practice, and that in addition a procedure should be provided for the enfranchisement of the various classes of Devadasi inams, which may consist either of land or assignment of land revenue granted by the State or by private persons They have accordingly recommended the insertion after section 44 of a new section instead of a mere proviso, laying down a procedure for the enfranchisement of inams granted by Government as well as by private individuals and declaring that on such enfranchisement the Devadasi shall be entitled to enjoy the inam free from the obligation of service. In the case of inam granted by the Government, the Committee have provided for the payment of quit-rent by the Devadasi to the temple, while in the case of post-settlement grants made by proprietors of estates and grants made by ryotwari landholders as well as by the temples themselves, they have thought it fair and equitable that the Devadasi who is freed from her obligation to do service and allowed to take a free-hold in the lands in her possession, should pay a rent to be fixed by the Collector to the temple concerned The Committee have empowered the Local Government to make rules for the imposition of the quit-rent on inams granted by the State, while for the fixing of the rents on other inams the Committee have incorporated in the Bill provisions analogous to those contained in section 40 of the Madras Estates Land Act for the fixing of money rents."
—See *Fort St George Gazette*, Part IV, 11th December, 1928, pp 1929-30

[13th *May*, 1929.]

An Act further to amend the Madras Hindu Religious Endowments Act, 1926.

WHEREAS it is expedient to put an end to the present practice of dedication of young girls as devadasis for service in Hindu temples in the Presidency of Madras; Preamble.

AND WHEREAS the enfranchisement or freeing of lands held by them on condition of service in the said temples from such condition will be an effective step in doing so;

AND WHEREAS it is expedient further to amend the Madras Hindu Religious Endowments Act, 1926, for these purposes;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows:—

1. This Act may be called THE MADRAS HINDU RELIGIOUS ENDOWMENTS (AMENDMENT) ACT, 1929. Short title.

2. After section 44 of the Madras Hindu Religious Endowments Act, 1926, the following section shall be inserted, namely:— Insertion of new section 44-A in Madras Act II of 1927.

"44-A. (1) (*a*) (i) Where the remuneration for any service to be performed by a devadasi in a temple consists of lands granted or continued in respect of, or annexed to, such service by the Government, the Local Government shall enfranchise the said lands from the condition of service, by the imposition of quit-rent; Enfranchisement or freeing of lands, etc., held by a devadasi on condition of service in a temple.

(ii) Where the remuneration for such service consists of an assignment of land revenue so granted or continued, the Local Government shall enfranchise such assignment of revenue from the condition of service:

Provided that where, at the time when proceedings are taken under this sub-section, the devadasi is herself the owner of the lands in respect of which the assignment of revenue has been made, enfranchisement shall be effected and quit-rent imposed in the manner laid down in sub-clause (i);

(iii) Where the remuneration for such service consists in part of lands and in part of an assignment of land revenue, enfranchisement of the lands shall be effected in the manner laid down in sub-clause (i) and of the assignment of land revenue in the manner laid down in sub-clause (ii):

Explanation.—For the purposes of this clause, a grant shall be deemed to consist of an assignment of land revenue in all cases in which the devadasi herself is not, at the time specified in the proviso to sub-clause (ii), the owner of the lands in question.

(*b*) Enfranchisement under clause (*a*) shall be effected in accordance with such rules as the Local Government may make in this behalf and shall take effect as and from such date as the Local Government may fix.

(2) Where the remuneration for such service consists, in whole or in part, of lands or of produce of lands not falling under sub-section (1), the Local Government shall direct the Collector to determine the amount of rent payable on the lands or the produce in question. The Collector shall thereupon, after giving notice to the parties concerned and holding such inquiry as may be prescribed by the Local Government, by an order determine the amount of rent, and in doing so, he shall have due regard to

(*a*) the rent payable by the tenant for lands of a similar description and with similar advantages in the same village or neighbouring villages; and

(*b*) the improvements, if any, effected by the devadasi, in respect of the lands:

Such order shall be communicated to the parties concerned and also published in the manner prescribed.

(3) The amount of rent fixed by the Collector under sub-section (2) may be questioned by petition presented to the Board of Revenue within three months of the date of the publication of the order under the said sub-section but subject to the result of such petition, the order of the Collector fixing the amount of rent under sub-section (2) shall be final and shall not be liable to be contested in any court of law:

Provided, however, that the Board of Revenue shall have power on sufficient grounds to entertain a petition presented after the expiration of the period of three months.

(4) While determining the rent under sub-section (2), the Collector shall fix a date from which the order shall take effect and such lands or produce shall be deemed to have been freed from the condition of service as and from the date so fixed.

(5) No obligation to render any service relating to any temple to which any devadasi may be subject by reason of any grant of land or assignment of land revenue or produce derived from land, shall be enforceable on such land, assignment or produce being enfranchised or freed, as the case may be, in the manner hereinbefore provided.

(6) No order passed under sub-sections (1), (2) and (3) shall operate as a bar to the trial of any suit or issue relating to the right to enjoy the land or assignment of land revenue or produce derived from land as the case may be.

(7) (*a*) The quit-rent imposed under sub-section (1) shall be payable to the temple concerned.

(*b*) The assignment of land revenue enfranchised under sub-section (1) or the rent fixed under sub-sections (2) and (3) as the case may be shall be payable to the devadasi concerned during her lifetime and after her death to the temple concerned.

(8) For the purpose of this section 'devadasi' shall mean any Hindu unmarried female, who is dedicated to a temple."

THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1929.

ACT NO. VI OF 1929.

[*5th April*, 1929.]

An Act to amend the Andhra University Act, 1925.

WHEREAS it is expedient to amend the Andhra University Act, 1925; it is hereby enacted as follows:— **Preamble.**

1. This Act may be called THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1929. **Short title.**

2. In section 2 of the Andhra University Act, 1925 (hereinafter referred to as 'the said Act')— **Amendment of section 2 of Madras Act II of 1926.**

In clause (*f*) the words 'Bellary, Anantapur, Cuddapah, Kurnool or Chittoor' shall be omitted; and the word 'or' shall be inserted before the word 'Nellore'.

3. In section 3 of the said Act— **Amendment of section 3 of Madras Act II of 1926.**

In clause (1) the words 'Bellary, Anantapur, Cuddapah, Kurnool and Chittoor' shall be omitted; and the word 'and' shall be inserted before the word 'Nellore'.

THE MADRAS PORT TRUST (AMENDMENT) ACT, 1929.

ACT No. VII OF 1929.

PREFATORY NOTE—The following are extracts from the Statement of Objects and Reasons appended to the Bill No VII of 1929:—"Under the Madras Port Trust Act, 1905, as it stands at present (II of 1905). it is not open to the Madras Port Trust to constitute reserve funds from which temporary loss of income or increase of expenditure or damage caused by fire, cyclones or other emergencies can be met. The constitution of such a fund or funds has been found necessary It is proposed to add a new section after section 74 for that purpose.

The opportunity has been taken to amend sections 64-B, 67, 68 and 70 to carry out alterations consequent on the introduction of clause 10 of section 5 in 1923 by Madras Act IV of 1923, which enables the Board to issue securities in more than one form (viz.,) debentures, bonds, and stock certificates "—Statement of Objects and Reasons, *Fort St George Gazette*, Part IV, p. 93, dated 19th February, 1929.

[*25th June*, 1929.]

An Act further to amend the Madras Port Trust Act, 1905.

Preamble.

WHEREAS it is expedient further to amend the Madras Port Trust Act, 1905, for the purposes hereinafter appearing; And whereas the previous sanction of the Governor-General has been obtained to the passing of this Act; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS PORT TRUST (AMENDMENT) ACT, 1929.

Amendment of section 64-B, Madras Act II of 1905.

2. In clause (*h*) of sub-section (1) of section 64-B of the Madras Port Trust Act, 1905 (hereinafter referred to as the said Act) for the word 'debentures' in both the places where it occurs, the words 'Port Trust Securities' shall be substituted.

Amendment of section 67, Madras Act II of 1905.

3. In section 67 of the said Act, for the expression 'debenture-holders' in both the places where it occurs the words 'holders of Port Trust Securities' shall be substituted.

Amendment of section 68, Madras Act II of 1905.

4. In section 68 of the said Act, for the words 'debenture-holders of the Board' occurring after the words 'of the other' the words 'holders of Port Trust Securities' shall be substituted.

Amendment of section 70, Madras Act II of 1905.

5. In sub-section (1) of section 70 of the said Act, for the words 'the Board's debentures' the words 'Port Trust Securities' shall be substituted.

Amendment of section 74, Madras Act II of 1905.

6. In section 74 of the said Act, clauses (5), (6) and (7) shall be renumbered as clauses (6), (7) and (8) respectively and the following shall be inserted as clause (5), namely:—

'(5) payments to reserve funds;'

7. After section 74 of the said Act, the following section shall be inserted, namely:— Insertion of new section 74-A in Madras Act II of 1905.

"74-A. (1) The Board may, out of its surplus income, set apart, from time to time, such sums as it thinks fit as a reserve fund or funds, for providing for all or any of the following cases, namely:— Establishment of reserve fund.

(*a*) any temporary decrease of income; or

(*b*) any temporary increase of expenditure; or

(*c*) replacement expenditure; or

(*d*) expenditure to make good loss or damage from fire, cyclone, shipwreck or other accident; or

(*e*) any other emergency arising in the conduct of its work under this Act:

Provided that the sums set apart annually in respect of, and the aggregate, at any time of, any such reserve fund shall not exceed such amounts as may from time to time be fixed in that behalf by the Local Government.

(2) Any such reserve fund or funds shall be invested in the securities of the Government of India or in Port Trust Securities."

THE MIRZAPURAM AND PEDAGONNUR IMPARTIBLE ESTATES ACT, 1929.

ACT No. VIII OF 1929.

PREFATORY NOTE.—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"Sri Raja Venkata Ramayya Apparao Bahadur Garu, the Zamindar of Mirzapuram and Pedagonnur Estates, is one of the direct lineal descendants of the ancient rulers of Nuzvid. He also owns one-fourth and one-sixth shares in Medur and Nidadavole Estates respectively.

The estates of Mirzapuram and Pedagonnur, which are proposed to be made impartible, originally formed part of the ancient Nuzvid zamindari which was dismembered in consequence of the decision of the Privy Council in I.L.R. 2 Mad 128 by which the said zamindari was declared partible The original rulers of Nuzvid, though feudal chiefs in name, exercised almost complete sway over their territory As regards the nature and character of the Nuzvid estate both the District Court of Kistna, as well as the High Court of Madras definitely found that the Nuzvid zamindari was ancient and impartible, succession to which was governed by the custom and law of primogeniture with the incidents of feudal or military tenure attached thereto. Even their Lordships of the Privy Council, who declared it partible mainly on the ground that its character was altered when it was divided into two estates, though this division was effected

not by the parties themselves, but as a matter of State Policy and by the direct intervention of the State and under its orders, held that the estate was impartible, inalienable and feudal in character until the time of the Permanent Settlement.

The said Mirzapuram and Pedagonnur Estates yield an annual income of about Rs 1,00,000 paying a peishkush of Rs 8,407-11-1 to the Government The said Raja Sri Venkata Ramayya Apparao Bahadur Garu, who is the sole owner of the estates, has expressed his desire and intention that the two estates should be held as impartible and inalienable estates governed by the law of primogeniture and that they should not be dismembered so that the family custom, dignity and status should be upheld in his line

The said Raja Sri Venkata Ramayya Apparao Bahadur Garu has at present two minor sons Since only the Mirzapuram and Pedagonnur Estates are proposed to be made impartible, one-fourth and one-sixth shares of Medur and Nidadavole Estates respectively and Bhimavole Estate which together yield an annual income of about Rs. 1,10,000 are ample provision for the second son and any male issue the present Zamindar may have in future. It may here be pointed out that when the zamindari of Doddappanayakanur was made impartible by Act II of 1918 the Zamindar had two sons, and that the estate of Vuyyur which was also made impartible by the same Act is also a part of the Nuzvid zamindari and as such stands exactly on the same footing as the Mirzapuram and Pedagonnur Estates

As there are no legal impediments in the way of a legislative declaration as desired, and as the present case falls within the principles underlying the enactment of the Madras Act II of 1904, it is desirable that these estates should be included in Annexure I of the Schedule to the Madras Impartible Estates Act II of 1904

The annexure below contains a list of the villages of Mirzapuram and Pedagonnur Estates—(Annexure omitted)—*Fort St George Gazette*, Part IV, p 134, dated 11th December, 1928

[*5th July*, 1929.]

An Act to declare the Mirzapuram and Pedagonnur Estates to be impartible within the meaning of the Madras Impartible Estates Act II of 1904.

Preamble.

WHEREAS it is expedient to declare that the Mirzapuram and Pedagonnur Estates are impartible and their proprietor cannot exercise unrestricted powers of alienation in respect thereof; it is hereby enacted as follows:—

Short title.

1. This Act may be called "THE MIRZAPURAM AND PEDAGONNUR IMPARTIBLE ESTATES ACT, 1929."

Mirzapuram and Pedagonnur Estates to be impartible within the meaning of the Madras Impartible Estates Act, 1904.

2. Notwithstanding any decision of courts, rule of law or enactment to the contrary, the Mirzapuram and Pedagonnur Estates, in the Kistna and West Godavari districts, are hereby declared to be impartible estates within the meaning of the Madras Impartible Estates Act II of 1904 and shall in the hands of their present owner as well as of his heirs and successors be subject to the provisions of that Act.

Savings.

3. This Act shall not affect any alienation made or debt incurred before the commencement of this Act.

THE ELLAMARRU AND PENJENDRA IMPARTIBLE ESTATES ACT, 1929.

ACT No. IX OF 1929.

PREFATORY NOTE—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"Sri Raja Sobhanadri Apparao Bahadur Garu, the Zamindar of Ellamarru and Penjendra estates, is one of the direct lineal descendants of the ancient rulers of Nuzvid He also owns one-fourth and one-sixth shares in Medur and Nidadavole estates respectively.

The estates of Ellamarru and Penjendra, which are proposed to be made impartible, originally formed part of the ancient Nuzvid zamindari which was dismembered in consequence of the decision of the Privy Council in I.L R. 2 Mad. 128 by which the said zamindari was declared partible. The original rulers of Nuzvid, though feudal chiefs in name, exercised almost complete sway over their territory As regards the nature and character of the Nuzvid estate both the District Court of Kistna as well as the High Court of Madras definitely found that the Nuzvid zamindari was ancient and impartible, succession to which was governed by the custom and law of primogeniture with the incidents of feudal or military tenure attached thereto Even their Lordships of the Privy Council, who declared it partible mainly on the ground that its character was altered when it was divided into two estates, though this division was effected not by the parties themselves, but as a matter of State Policy and by the direct intervention of the State and under its orders, held that the estate was impartible, inalienable and feudal in character until the time of the Permanent Settlement.

The said Ellamarru and Penjendra estates yield an annual income of Rs 1,06,000 paying a peishkush of Rs 10,272-15-2 to the Government. The said Sri Raja Sobhanadri Apparao Bahadur Garu, who is the sole owner of the estates, has expressed his desire and intention that the two estates should be held as impartible and inalienable estates governed by the law of primogeniture and that they should not be dismembered so that the family custom, dignity and status should be upheld in his line

The said Sri Raja Sobhanadri Apparao Bahadur Garu has at present two minor sons Since only the Ellamarru and Penjendra estates are proposed to be made impartible one-fourth and one-sixth shares of Medur and Nidadavole estates respectively which together yielded an annual income of Rs. 1,30,000 are ample provision for the second son and any male issue the present Zamindar may have in future. It may here be pointed out that when the zamindari of Doddappanayakanur was made impartible by Act II of 1918 the Zamindar had two sons, and that the estate of Vuyyur which was also made impartible by the same Act is also a part of the Nuzvid zamindari and as such stands exactly on the same footing as the Ellamarru and Penjendra estates.

As there are no legal impediments in the way of a legislative declaration as desired, and as the present case falls within the principles underlying the enactment of the Madras Act II of 1904, it is desirable that these estates should be included in Annexure I of the Schedule to the Madras Impartible Estates Act II of 1904.

The annexure below contains a list of the villages of Ellamarru and Penjendra Estates"—(Annexure omitted)—*Fort St. George Gazette*, Part IV, p. 136, dated 11th December, 1928.

[5th July, 1929.]

An Act to declare the Ellamarru and Penjendra Estates to be impartible within the meaning of the Madras Impartible Estates Act II of 1904.

Preamble.

WHEREAS it is expedient to declare that the Ellamarru and Penjendra estates are impartible and their proprietor cannot exercise unrestricted powers of alienation in respect thereof; it is hereby enacted as follows:—

Short title.

1. This Act may be called "THE ELLAMARRU AND PENJENDRA IMPARTIBLE ESTATES ACT, 1929."

Ellamarru and Penjendra estates to be impartible within the meaning of the Madras Impartible Estates Act, 1904.

2. Notwithstanding any decision of courts, rule of law, or enactment to the contrary, Ellamarru and Penjendra estates, in the Kistna and West Godavari districts, are hereby declared to be impartible within the meaning of the Madras Impartible Estates Act II of 1904 and shall, in the hands of their present owner as well as his heirs and successors, be subject to the provisions of that Act.

Savings.

3. This Act shall not affect any alienation made or debt incurred before the commencement of this Act.

THE MADRAS MEDICAL REGISTRATION (AMENDMENT) ACT, 1929.

ACT No. X OF 1929.

PREFATORY NOTE—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"Under the existing Provincial Medical Registration Acts, practitioners registered in any province are required to pay a fresh fee in the event of their seeking registration in any other province The only exemption is the Punjab Medical Registration Act, 1916 (Punjab Act II of 1916), under which persons registered in other provinces are eligible for registration without further payment It is considered that reciprocal arrangements for the free registration in all provinces of practitioners who have once been registered in any province would remove the hardship and inconvenience involved by double payment of fees All Local Governments which were consulted by the Government of India in the matter have agreed to this course. This Bill provides for the amendment of the Madras Medical Registration Act, 1914 (Madras Act IV of 1914), so as to permit the registration without fees on a reciprocal basis in the Madras Presidency of practitioners registered in other provinces The same principle will apply also to the payment of fees for the registration of any additional qualification obtained subsequent to the original registration"—Statement of Objects and Reasons, *Fort St George Gazette,* Part IV, 19th February, 1929.

[24th June, 1929.]

An Act to amend the Madras Medical Registration Act, 1914.

Preamble.

WHEREAS it is expedient to amend the Madras Medical Registration Act, 1914, for the purpose hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS MEDICAL REGISTRATION (AMENDMENT) ACT, 1929.

Amendment of section 14, Madras Act IV of 1914

2. The first paragraph of section 14 of the Madras Medical Registration Act, 1914, shall be renumbered as sub-section (1) and the second paragraph of the said section as sub-section (2) thereof and after sub-section (2) as renumbered the following shall be inserted as sub-section (3), namely:—

"(3) Nothing in sub-section (1) or (2) shall be deemed to apply to any person whose name has been registered for the primary or additional qualification, as the case may be, under any Act for the registration of medical practitioners for the time being in force in any part of British India, if the said Act provides for the registration of persons registered under this Act without the payment of any fee for the primary or additional qualification as the case may be."

THE MADRAS SERVICES COMMISSION ACT, 1929.

ACT No. XI OF 1929.

PREFATORY NOTE—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

"A Public Service Commission has been established by the Secretary of State in Council under section 96-C of the Government of India Act for the recruitment of officers to the All-India and Central Services, and also for advising the Governor-General in Council regarding the disposal of appeals and memorials presented by individual officers. It is considered necessary and expedient that a Commission exercising similar functions as regards the Public Services in the Madras Presidency should be established. This Bill follows the lines of section 96-C of the Government of India Act and the rules framed by the Secretary of State in Council regarding the functions of the said Public Service Commission.

NOTES ON CLAUSES

Clause 3.—The language of this clause is an adaptation of the language of section 96-C of the Government of India Act

Part II—The provisions of this Part are similar to the corresponding provisions in the rules relating to the Public Service Commission.

Clause 20.—Besides providing specifically for certain common species of undue influence, the explanation of that term contains a general provision adapted with slight modification from the definition of 'undue influence' in section 2 of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Victoria, Chapter 51).—*Fort St George Gazette, Part* IV, dated 22nd January, 1929.

[*5th October*, 1929.]

Preamble.

WHEREAS the Secretary of State for India in Council has made a rule authorizing the local legislature, subject to certain conditions and restrictions, to make laws for the establishment, and for determining the functions, of a Commission to regulate the Public Services of the Presidency of Madras;

AND WHEREAS it is necessary and expedient to establish a Commission for discharging the functions hereinafter specified in relation to the said Services;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act; it is hereby enacted as follows:—

PART I.

CHAPTER I.—PRELIMINARY.

Short title, extent and commencement.

1. (*a*) This Act may be called THE MADRAS SERVICES COMMISSION ACT, 1929.

(*b*) It extends to the whole of the Presidency of Madras.

(*c*) It shall come into force on such date as the Local Government may, by notification in the *Fort St. George Gazette*, appoint.

Definitions.

2. (1) In this Act, unless there is something repugnant in the subject or context—

(*a*) 'Commission' means 'The Madras Services Commission' established under this Act;

(*b*) 'Chairman' means the Chairman of the Commission referred to in clause (*a*);

(*c*) 'Member' means a member of the Commission referred to in clause (*a*); and

(*d*) 'Public Service Commission' means the Commission established under section 96-C of the Government of India Act.

(2) In this Act, the terms 'All-India service', 'provincial service', 'subordinate service' and 'special post' shall have the same meaning as they have in the rules made under sub-section (2) of section 96-B of the Government of India Act by the Secretary of State for India in Council, the Governor-General in Council or the Local Government.

CHAPTER II.—CONSTITUTION, STRENGTH, SALARIES AND STAFF OF THE MADRAS SERVICES COMMISSION.

Establishment of Madras Services Commission.

3. There shall be established for the Presidency of Madras a Commission named 'The Madras Services Commission' consisting of a Chairman and two other members for performing the functions hereinafter specified in this Act in respect of the Public services in the said Presidency.

Appointment and removal of the Chairman and members.

4. (1) The Chairman and the other members of the Commission shall be appointed and may be removed from office by the Governor in Council:

Provided that no order of removal shall be made without the personal concurrence of the Governor of Madras.

(2) No person shall be appointed to be the Chairman or a member, and no Chairman or member shall continue to hold office as such, after he has completed 60 years of age.

(3) No person shall be appointed to be the Chairman or a member unless he has previously given an undertaking in writing to the effect that he will not, either during or after his service on the Commission, accept any other office under the Crown in India except—

(*a*) if appointed as the Chairman, the office of Chairman or member of the Public Service Commission; and

(*b*) if appointed as a member, either of the offices mentioned in clause (*a*) or the office of Chairman of the Commission.

(4) No chairman or member shall hold during his service on the Commission any other office under the Crown in India.

Nothing in this sub-section shall, however, bar the Chairman or other member having a lien on his post on the Commission while holding the office of Chairman or member of the Public Service Commission, or the office of Chairman of the Commission, as the case may be.

Salary of the Chairman and members.

5. There shall be paid to the Chairman a salary of three thousand rupees per mensem and to each of the other members a salary of two thousand rupees per mensem.

Nothing in this section shall prevent a Chairman or other member who at the time of his appointment as such is a retired Government servant from drawing his pension from Government in addition to his salary under this section.

Appointment and salary of Secretary.

6. The Commission may, in its discretion, appoint a Secretary to the Commission, on such salary not exceeding one thousand and five hundred rupees per mensem as it thinks fit:

Provided that, if the person so appointed is at the time of his appointment a Government servant, his salary shall be fixed with the previous sanction of the Local Government.

Commission's establishment etc.

7. It shall be lawful for the Commission and it is hereby empowered to employ such persons as it may deem necessary and incur expenditure for such employment as well as for contingencies, supplies and services and for other expenses connected with its work, up to an aggregate sum of one thousand rupees per mensem:

Provided that if any person so employed is at the time of his appointment a Government servant, his salary shall be fixed with the previous sanction of the Local Government.

PART II.—FUNCTIONS OF THE COMMISSION.

CHAPTER III.—FUNCTIONS OF THE COMMISSION AS TO RECRUITMENT.

Recruitment generally.

8. The Commission shall advise the Local Government on any question which the Local Government may refer to it in connexion

with the recruitment to any provincial or subordinate service or special post.

Recruitment by competitive examination.

9. Where any competitive examination is to be held in India for the purpose of recruitment to any provincial or subordinate service or special post, the Commission shall—

(i) advise the Local Government in regard to the regulations prescribing—

(*a*) the qualifications of candidates,

(*b*) the conditions of admission to the examination, and

(*c*) the syllabus of the examination;

(ii) announce the number of vacancies to be filled from among the candidates for the examination;

(iii) make all arrangements for the actual conduct of the examination;

(iv) arrange the candidates in order of merit on the results of the examination; and

(v) forward a list of the candidates so arranged to the Local Government.

Recruitment by selection.

10. Where recruitment to any provincial or subordinate service or special post is to be made by selection in India the Commission shall—

(i) advise the Local Government in regard to the regulations prescribing the qualifications of candidates and the submission of applications;

(ii) announce the number of vacancies, and invite applications;

(iii) consider all applications received and interview such candidates as it considers most suitable for appointment; and

(iv) submit to the Local Government a list consisting of such number, as the Local Government may fix, of the candidates whom the Commission considers most suitable for appointment arranged in the order of preference:

Provided that in case the appointment is to be made by the Local Government, the Local Government may, if they think fit, appoint an officer to be present at the interview referred to in clause (iii).

Recruitment by promotion.

11. Where recruitment to any permanent post in a provincial service is to be made by promotion from a subordinate service, the Commission shall—

(i) consider the claims of candidates nominated by the head of the department;

(ii) thereafter advise the Local Government in respect of each candidate nominated whether his qualifications are sufficient and whether his record proves him to have the character and

ability requisite for the service to which it is proposed to appoint him; and

(iii) arrange the candidates in order of preference.

12. In the exercise of its functions under sections 9, 10 and 11 the Commission shall observe the rules, if any, made by the Local Government regarding the constitution of or recruitment to any provincial or subordinate service or special post under sub-section (2) of section 96-B of the Government of India Act. Commission to observe Statutory Rules.

CHAPTER IV.—FUNCTIONS OF THE COMMISSION TO HOLD EXAMINATIONS FOR PROBATIONERS AND PERSONS ALREADY IN THE SERVICE OF GOVERNMENT.

13. Where any examination is to be held in India to determine whether probationers or officers already in the service of the Local Government have sufficient knowledge of any language or of any law, rules or orders which they may be called upon to administer, or possess any other qualifications including sufficient skill in equitation, which can be tested by examination, to justify their appointment to or promotion in an All-India, provincial or subordinate service or a special post, the Commission shall— Examination for confirmation and promotion.

(i) advise the Local Government in regard to regulations prescribing—

(*a*) the conditions of admission to the examination,

(*b*) the syllabus of the examination, and

(*c*) the percentage of marks to be obtained for passing the examination;

(ii) make all arrangements for the actual conduct of the examination;

(iii) arrange the successful candidates in order of merit; and

(iv) publish the results in the *Fort St. George Gazette*:

Provided that the Commission shall not undertake any duties under this section in respect of an officer of an All-India service or of any other officer appointed by the Secretary of State in Council or the Governor-General in Council save with the general or special approval of the Governor-General in Council or in the case of persons appointed by the Secretary of State in Council, of the Secretary of State in Council

CHAPTER V.—FUNCTIONS OF THE COMMISSION IN REGARD TO DISCIPLINARY CASES.

14. The provisions of this chapter shall not apply to any person in the Civil Service of the Crown in India other than a member of a provincial or subordinate service or the holder of a special post under the administrative control of the Local Government. Extent of application.

Appeals.

15. The Local Government shall—

(i) before considering any appeal presented to them under the rules made in that behalf under sub-section (2) of section 96-B of the Government of India Act against any order—

(*a*) of censure,
(*b*) withholding an increment or promotion,
(*c*) of reduction to a lower post,
(*d*) of suspension,
(*e*) of removal, or
(*f*) of dismissal, or

(ii) before passing any original order—

(*a*) withholding an increment or promotion,
(*b*) of reduction to a lower post,
(*c*) of removal, or
(*d*) of dismissal,

consult the Commission in regard to the order to be passed:

Provided that it shall not be necessary for the Local Government to consult the Commission in any case—

(*a*) relating to the termination of probation,

(*b*) relating to the reversion to his permanent post of an officer officiating in a higher post,

(*c*) relating to the termination of the employment of any officer in accordance with the terms of his contract of employment, or

(*d*) in which the Commission has, at any previous stage, given advice as to the order to be passed and no fresh question has thereafter arisen for determination.

Memorials.

16. The Local Government may consult the Commission as to the orders to be passed on any memorial submitted to them by any person to whom the provisions of this Chapter apply.

Records to be sent to Commission on reference.

17. In any case in which the advice of the Commission is sought under section 15 or 16, the record of the case shall be forwarded to the Commission and the opinion given by the Commission shall form part of the record of the case and shall be communicated to the officer or officers concerned along with the orders of the authority empowered to pass orders on the case.

PART III

CHAPTER VI.—MISCELLANEOUS.

Vacancy not to invalidate acts of Commission.

18. The proceedings of the Commission shall not be invalidated by any vacancy in the office of the Chairman or a member.

Expenditure to be defrayed from provincial revenues.

19. The salaries referred to in sections 5 and 6 and the expenditure incurred under section 7 shall be defrayed from the provincial revenues of the Local Government.

20 Within six months of the end of each financial year the Commission shall present to the Local Government a report on its proceedings during such financial year and the report shall be brought up by the Local Government for the consideration of the Legislative Council. Annual report to be presented to Local Government

21. (1) The Local Government may make rules to carry out all or any of the purposes of this Act and not inconsistent therewith. Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing power, the Local Government may make rules prescribing the procedure to be adopted by the Commission.

(3) Rules made under this section shall be published in the *Fort St. George Gazette* and laid in draft before the Madras Legislative Council for a period of three months while the Council is in session and shall on the expiry of such period be republished and upon such re-publication take effect as if enacted in this Act.

THE MADRAS UNIVERSITY (AMENDMENT) ACT, 1929.

ACT No. XII OF 1929.

An Act to amend the Madras University Act, 1923.

WHEREAS it is expedient to amend the Madras University Act, 1923, for the purposes hereinafter appearing; it is hereby enacted as follows:— Preamble.

1. This Act may be called THE MADRAS UNIVERSITY (AMENDMENT) ACT, 1929. Short title.

2. In section 2 of the Madras University Act, 1923 (hereinafter referred to as the said Act)— Amendment of section 2 of Madras Act VII of 1923.

(i) after clause (*c*), the following clause shall be inserted, namely:—

"(*cc*) '*Honours College*' means a first-grade college in which provision is made for Honours or post-graduate courses of study leading up to the higher degrees of the University;"

(ii) after clause (*e*), the following clause shall be inserted, namely:—

"(*ee*) '*Oriental College*' means an institution in which provision is made for courses of study in oriental learning only and for the preparation of students for degrees, titles, or diplomas of the University in such learning, in accordance with the regulations;"

(iii) in clause (*f*), after the words 'prescribed by' the words 'this Act or' shall be inserted;

(iv) after clause (*g*), the following clause shall be inserted, namely:—

"(*gg*) '*Professional College*' means a college in which are provided courses of study leading up to the professional degrees of the University;"

(v) for clause (*h*), the following clause shall be substituted, namely:—

"(*h*) '*Registered graduates*' means graduates registered under this Act or the Indian Universities Act, 1904;"

(vi) in clause (*g*), for the words 'constituent college or of an affiliated college' the words 'constituent, affiliated or oriental college' shall be substituted;

(vii) for clause (*j*), the following clause shall be substituted, namely:—

"(*j*) '*Teachers*' means such professors, readers, lecturers and other persons giving instruction in constituent, affiliated or oriental colleges or in hostels as may be declared by the Statutes to be teachers," and

(viii) in clause (*n*), after the words "means a," the words "whole-time or part-time" shall be inserted.

Amendmen of section 3 of Madras Act VII of 1923.

3. In sub-section (1) of section 3 of the said Act, the words 'and the Council of Affiliated Colleges' shall be omitted, and after the words 'the Syndicate,' the word 'and' shall be inserted.

Insertion of new section 4-A in Madras Act VII of 1923.

4. After section 4 of the said Act, the following section shall be inserted, namely:—

Powers of the University.

"4-A. The University shall have the following powers, namely:—

(1) to provide for instruction and training in such branches of learning as it may think fit and to make provision for research and for the advancement and dissemination of knowledge;

(2) to establish, maintain and manage Institutes of Research;

(3) to make such provision as will enable constituent, affiliated and oriental colleges to undertake specialization of studies and to organize common laboratories, libraries and other equipment for research work;

(4) to institute professorships, readerships, lectureships, and any other teaching posts required by the University and to appoint persons to such professorships, readerships, lectureships, and other teaching posts;

(5) to institute degrees, titles, diplomas and other academic distinctions;

(6) to hold examinations and to confer degrees, titles, diplomas and other academic distinctions on persons who—

(a) shall have pursued an approved course of study in a constituent, affiliated or oriental college unless exempted therefrom in the manner prescribed by the Statutes and shall have passed the prescribed examinations of the University; or

(b) shall have carried on research under conditions prescribed;

(7) to confer honorary degrees or other distinctions under conditions prescribed;

(8) (a) to institute, maintain and manage constituent colleges, to recognize colleges not maintained by the University as constituent colleges, to allow colleges recognized by the University before the passing of this Act to continue to exercise the rights and privileges conferred on them by such recognition and any further rights conferred by or under this Act and to withdraw recognition from colleges;

(b) to approve institutions as oriental colleges, to allow institutions approved by the University before the passing of this Act to continue to exercise the rights and privileges conferred on them by such approval and any further rights conferred by or under this Act until such time as they may be transferred to other Universities and to withdraw approval from institutions;

(9) to affiliate to itself colleges outside the limits of the University, to allow colleges affiliated to the University before the passing of this Act to continue to exercise the rights and privileges conferred on them by the affiliation and any further rights conferred by or under this Act until such time as they may be transferred to other Universities and to withdraw affiliation from colleges;

(10) to recommend to the Local Government the recognition of any local area as a University centre;

(11) to establish, maintain and manage hostels, to recognize hostels not maintained by the University and to withdraw recognition therefrom;

(12) to hold and manage endowments and to institute and award fellowships, travelling fellowships, scholarships, studentships, bursaries, exhibitions, medals and prizes;

(13) to fix fees and to demand and receive such fees as may be prescribed;

(14) to create and manage an affiliated college fund;

(15) to make grants from the funds of the University for the maintenance of a University Training Corps;

(16) to exercise such control over the students of the University through the colleges as will secure their health and well-being;

(17) to institute and provide funds for the maintenance of—

(*a*) a Publication Bureau;

(*b*) an Employment Bureau;

(*c*) Students' Unions;

(*d*) University Extension Boards; and

(*e*) University Athletic Clubs;

(18) to co-operate with other Universities and other authorities in such manner and for such purposes as the University may determine; and

(19) generally to do all such other acts and things as may be necessary or desirable to further the objects of the University."

Amendment of section 5 of Madras Act VII of 1923.

5. In sub-section (1) of section 5 of the said Act—

(i) for the words 'creed or class', the words 'creed, class, or political views' shall be substituted; and

(ii) for the words 'relating to religious belief or profession' the words 'relating to religious belief or profession or political views' shall be substituted.

Substitution of new section for section 6 of Madras Act VII of 1923.

6. For section 6 of the said Act, the following section shall be substituted, namely:—

Attendance qualifying for University examinations.

"6. No attendance at instruction given in any institution other than that conducted, recognized or approved by the University shall qualify for admission to any examination of the University."

Amendment of section 7 of Madras Act VII of 1923.

7. In sub-section (2) of section 7 of the said Act, for the words 'associated with,' the words 'maintained, recognized or approved by or affiliated to' shall be substituted and the words 'or done' occurring after the words 'work conducted' shall be omitted.

Substitution of new section for section 8 of Madras Act VII of 1923.

8. For section 8 of the said Act the following section shall be substituted, namely:—

Officers of the University.

"8. The following shall be the officers of the University:—

(1) The Chancellor;

(2) The Pro-Chancellor;

(3) The Vice-Chancellor;

(4) The Registrar; and

(5) Such other persons as may be declared by the Statutes to be officers of the University."

9. In sub-section (1) of section 9 of the said Act, for the first sentence the following sentence shall be substituted, namely:— Amendment of section 9 of Madras Act VII of 1923.

"The Governor of Madras shall be the Chancellor of the University."

10. For sub-section (1) of section 10 of the said Act the following sub-section shall be substituted, namely:— Amendment of section 10 of Madras Act VII of 1923.

"10. (1) The Minister administering the subject of education for the time being shall be the Pro-Chancellor of the University."

11. In section 11 of the said Act— Amendment of section 11 of Madras Act VII of 1923.

(i) in sub-section (1), for the words 'five persons' the words 'three persons,' and for the words 'shall be prescribed' the words 'may be prescribed by the statutes' shall be substituted; and

(ii) in sub-section (2)—

(*a*) for the word 'Where' the word 'When' shall be substituted; and

(*b*) for the words 'carrying on the duties' the words 'exercising the powers and performing the duties' shall be substituted.

12. In section 12 of the said Act— Amendment of section 12 of Madras Act VII of 1923.

(i) in sub-section (1), the words 'and of the Council of Affiliated Colleges' shall be omitted and after the words 'the Syndicate,' the word 'and' shall be inserted; the word 'at' occurring between the word 'address' and the words 'any meeting' shall be omitted; and

(ii) in sub-section (3), the words 'and the Council of Affiliated Colleges' shall be omitted and after the words 'the Syndicate,' the word 'and' shall be inserted.

13. After section 12 of the said Act, the following section shall be inserted, namely:— Insertion of new section 12-A in Madras Act VII of 1923.

"12-A. (1) The Registrar shall be a whole-time paid officer of the University appointed by the Syndicate for such period and on such terms as may be prescribed by the Statutes. The Registrar.

(2) The Registrar shall exercise such powers and perform such duties as may be prescribed."

14. In section 13 of the said Act— Amendment of section 13 of Madras Act VII of 1923.

(i) at the end of clause (5), the word 'and' shall be inserted;

(ii) clause (6) shall be omitted and clause (7) re-numbered as (6); and

(iii) in clause (6) as so re-numbered, for the word 'authorities' where it first occurs, the word 'bodies' shall be substituted.

Substitution of new section 14 in Madras Act VII of 1923.

15. For section 14 of the said Act the following section shall be substituted, namely:—

The Senate.

"14. (*a*) The Senate shall consist of the following persons, namely:—

CLASS I—EX-OFFICIO MEMBERS.

(1) The Chancellor;
(2) The Pro-Chancellor;
(3) The Vice-Chancellor;
(4) The Director of Public Instruction, Madras;
(5) The Principals of first-grade colleges;
(6) The Principals of professional colleges,
(7) The whole-time University Professors paid from University funds or endowments; and
(8) Members of the Syndicate who are not otherwise members of the Senate.

CLASS II—LIFE MEMBERS.

(1) Such number of persons not exceeding five as may be nominated by the Chancellor to be life members on the ground that they have rendered eminent services to education; and

(2) All persons who make a donation of not less than Rs. 25,000 to or for the general purposes of the University.

CLASS III—OTHER MEMBERS.

(1) Thirty members elected by registered graduates from among themselves according to the principle of proportional representation by means of the single transferable vote.

(2) Twenty members elected by the Academic Council from among its own body, of whom not less than ten shall be teachers of affiliated colleges.

(3) Twelve members elected by the non-official members of the Legislative Council of Madras from among themselves.

(4) Five persons elected from among themselves by the Principals of second-grade colleges affiliated to the University and three persons elected from among themselves by Headmasters of High Schools recognized by the Local Government.

(5) Four members elected by the Corporation of Madras from among its own body.

(6) Two members for each district, one elected by the members of the District Board from among themselves and the other by the Municipal Councillors of the Municipalities in the district from among themselves.

(7) Two members elected by the Madras Chamber of Commerce and two members elected by the Southern India Chamber of Commerce.

(8) Two members elected by the Madras Landholders' Association.

(9) Two members elected by the Muhammadan Educational Association of Southern India.

(10) Every association making a donation of not less than Rs. 25,000 and every person making a donation of not less than Rs. 10,000 but not amounting to Rs. 25,000 or more to or for the general purposes of the University shall be entitled to nominate one member to the Senate who shall be a member for five years and if such member vacates his office before the expiry of the period of five years, another member may be nominated in his place by the association or person concerned, who shall hold office for the residue of such period, and the same provision shall apply in all cases of vacancies arising before the expiry of such period.

(11) Thirty members nominated by the Chancellor, of whom not less than twenty shall be nominated to secure the representation of the depressed and backward classes and of other minorities not otherwise adequately represented; and

(12) One member to represent each of the chief Indian languages in the Presidency, to be nominated by the Chancellor.

(*b*) Save as otherwise provided, elected and nominated members of the Senate shall hold office for a period of three years from the date of the election or nomination, as the case may be;

Provided, however, that no member elected in his capacity as a member of a particular electorate shall hold office for a longer period than three months after he has ceased to be such member unless meanwhile he again becomes a member of that electorate;

Provided also that where an elected or nominated member of the Senate is appointed temporarily to any of the offices by virtue of which he is entitled to be a member of the Senate *ex-officio*, he shall, by notice in writing signed by him and communicated to the Vice-Chancellor within seven days from the date of his taking charge of his appointment, choose whether he will continue to be a member of the Senate by virtue of his election or nomination or whether he will vacate office as such member and become a member *ex-officio* by virtue of his appointment and the choice shall be conclusive. On failure to make such choice, he shall be deemed to have vacated his office as an elected or nominated member.

(*c*) When a person ceases to be a member of the Senate he shall cease to be a member of any of the authorities of the Univer-

sity of which he may happen to be a member by virtue of his membership of the Senate."

Substitution of new section for section 15 of Madras Act VII of 1923.

16. For section 15 of the said Act, the following section shall be substituted, namely:—

The Senate to be the supreme governing body.

"15. The Senate shall be the supreme governing body of the University and shall have power to review the action of the Syndicate and of the Academic Council save where the Syndicate and the Academic Council have acted in accordance with powers conferred on them under this Act, the Statutes, the Ordinances or the Regulations and shall exercise all the powers of the University not otherwise provided for and all powers requisite to give effect to the provisions of this Act:

Provided that if any question arises whether the Syndicate or the Academic Council has acted in accordance with such powers as aforesaid or not, the question shall be decided by a resolution passed by two-thirds of the number of members present and voting at a meeting of the Senate and the decision shall be final."

Substitution of new section for section 16 of Madras Act VII of 1923.

17. For section 16 of the said Act, the following section shall be substituted, namely:—

Powers of the Senate.

"16. In particular and without prejudice to the generality of the powers conferred by section 15, the Senate shall have the following powers, namely:—

(1) to make Statutes and amend or repeal the same;

(2) to modify or cancel Ordinances and Regulations in the manner prescribed by this Act;

(3) to make such provision as will enable constituent, affiliated and oriental colleges to undertake specialization of studies and to organize common laboratories, libraries and other equipment for research work;

(4) to provide for instruction and training in such branches of learning as it may think fit;

(5) to institute and maintain Constituent Colleges, to prescribe in consultation with the Academic Council the conditions of recognition as Constituent Colleges, of Colleges not maintained by the University, to allow Colleges recognized by the University before the passing of this Act to continue to exercise the rights and privileges conferred on them by the recognition and any further rights conferred by or under this Act and to withdraw recognition therefrom;

(6) to prescribe in consultation with the Academic Council the conditions for approving as Oriental Colleges institutions in which provision is made for courses of study in Oriental Learning

only and for the preparation of students for degrees, titles or diplomas of the University, and to allow Oriental institutions approved by the University before the passing of this Act to continue to exercise the rights and privileges conferred on them by such approval and any further rights conferred by or under this Act until they are transferred to other Universities and to withdraw such approval;

(7) to provide for research and the advancement and dissemination of knowledge;

(8) to institute, after consultation with the Academic Council, professorships, readerships, lectureships and any other teaching posts required by the University;

(9) to establish, equip and maintain University laboratories, libraries and Institutes of Research;

(10) to prescribe in consultation with the Academic Council the conditions of affiliation to the University of Colleges outside the limits of the University, to allow colleges affiliated to the University before the passing of this Act to continue to exercise the rights and privileges conferred on them by the affiliation and any further rights conferred by or under this Act until they are transferred to other Universities and to withdraw affiliation from colleges;

(11) to provide after consultation with the Academic Council such lectures and instruction for students of the constituent affiliated and oriental colleges of the University as the Senate may determine and also to provide for lectures and instruction to persons not being students of the University and to grant diplomas to them;

(12) to provide for the inspection of all colleges and hostels;

(13) to institute degrees, titles, diplomas and other academic distinctions;

(14) to confer degrees, titles, diplomas and other academic distinctions on persons who—

(*a*) shall have pursued an approved course of study in a constituent, affiliated or oriental college or have been exempted therefrom in the manner prescribed by the statutes and shall have passed the prescribed examinations of the University, or

(*b*) shall have carried on research under conditions prescribed;

(15) to confer honorary degrees or other distinctions on the recommendation of not less than two-thirds of the members of the Syndicate;

(16) to establish and maintain hostels;

(17) to institute, after consultation with the Academic Council, fellowships, travelling fellowships, scholarships, studentships, bursaries, exhibitions, medals and prizes;

(18) to prescribe the fees to be charged for the recogni- and affiliation of colleges, for admission to the examinations, degrees and diplomas of the University, for the registration of the graduates and for all or any of the purposes specified in section 4-A of this Act;

(19) to consider and take such action as it may deem fit on the annual report, the annual accounts and the financial estimates;

(20) to create and manage an affiliated college fund and make statutes therefor;

(21) to institute, after consultation with the Academic Council, a Publication Bureau, an Employment Bureau, Students' Unions, University Extension Boards and University Athletic Clubs;

(22) to enter into any agreement with the Government or with a private management for assuming the management of any institution and for taking over its properties and liabilities or for any other purpose not repugnant to the provisions of this Act;

(23) to make statutes regulating the method of election to the authorities of the University and the procedure at the meeting of the Senate, Syndicate and other authorities of the University and the quorum of members required for the transaction of business by the authorities of the University other than the Senate;

(24) to recommend to the Local Government the recognition of any local area as a University centre;

(25) to co-operate with other Universities and other authorities in such manner and for such purposes as it may determine; and

(26) to delegate such of its powers as it may deem fit to any authority or authorities constituted under this Act."

Amendment of section 17 of Madras Act VII of 1923.

18. For sub-section (1) of section 17 of the said Act the following sub-section shall be substituted, namely:—

"17. (1) The Senate shall meet at least twice a year on dates to be fixed by the Vice-Chancellor. One of such meetings shall be called the annual meeting. The Senate may also meet at such other times as it may, from time to time, determine."

Amendment of section 18 of Madras Act VII of 1923.

19. (1) The paragraphs of section 18 of the said Act except the last paragraph shall be lettered as sub-section (*a*) of section 18 and in the sub-section as so lettered, under the head 'Class II—Other Members'—

(*a*) in clause (2) for the word 'three' the word 'six' shall be substituted, and at the end of clause (2) the following words shall be added: 'of whom three shall be teachers of affiliated colleges and the rest shall be persons other than teachers of affiliated colleges';

(*b*) clause (3) shall be omitted and clause (4) re-numbered as (3); and

(*c*) after clause (3) as so re-numbered, the following proviso shall be inserted, namely:—

"Provided that no whole-time University Professor or whole-time teacher of the University shall be eligible for election or nomination as a member of the Syndicate."

(2) For the last paragraph of the said section, the following sub-sections shall be substituted, namely:—

"(*b*) Save as otherwise provided, elected and nominated members of the Syndicate shall hold office for a period of three years from the date of the election or nomination as the case may be;

Provided, however, that no member elected in his capacity as a member of a particular electorate shall hold office for a longer period than three months after he has ceased to be such member, unless meanwhile he again becomes a member of that electorate;

Provided also that where an elected or nominated member of the Syndicate is appointed temporarily to any of the offices by virtue of which he is entitled to be a member of the Syndicate *ex-officio*, he shall, by notice in writing signed by him and communicated to the Vice-Chancellor within seven days from the date of his taking charge of his appointment, choose whether he will continue to be a member of the Syndicate by virtue of his election or nomination or whether he will vacate office as such member and become a member *ex-officio* by virtue of his appointment and the choice shall be conclusive. On failure to make such choice, he shall be deemed to have vacated his office as an elected or nominated member;

Provided also that a member of the Syndicate shall cease to be a member if he subsequently becomes a whole-time University Professor or whole-time teacher of the University.

(*c*) When a person ceases to be a member of the Syndicate, he shall cease to be a member of any of the authorities of the University of which he may happen to be a member by virtue of his membership of the Syndicate."

20. For section 19 of the said Act the following section shall be substituted, namely:— **Substitution of new section for section 19 of Madras Act VII of 1923.**

"19. The Syndicate shall have the following powers, namely:— **Powers of the Syndicate.**

(*a*) to make ordinances and amend or repeal the same;

(*b*) to hold, control and administer the properties and funds of the University;

(*c*) to direct the form, custody and use of the common seal of the University;

(*d*) to regulate and determine all matters concerning the University in accordance with this Act, the Statutes, the Regulations and the Ordinances;

(*e*) to frame the financial estimates of the University and submit the same to the Senate;

(*f*) to administer all properties and funds placed at the disposal of the University for specific purposes;

(*g*) to appoint the University Professors and Readers and the teachers and servants of the University, fix their emoluments, if any, define their duties and the conditions of their service; and provide for the filling up of temporary vacancies;

(*h*) to suspend and dismiss the University Professors and Readers and the teachers and servants of the University;

(*i*) to accept endowments, bequests, donations and transfers of any movable and immovable properties to the University on its behalf, provided that all such endowments, bequests, donations and transfers shall be reported to the Senate at its next meeting;

(*j*) to recognize colleges within the limits of the University and not maintained by the University as constituent colleges; affiliate to the University colleges outside the limits of the University; approve institutions as oriental colleges and recognize hostels not maintained by the University and withdraw recognition therefrom;

(*k*) to arrange for and direct the inspection of all constituent, affiliated and oriental colleges and hostels;

(*l*) to prescribe the qualifications of teachers in constituent, affiliated and oriental colleges and hostels;

(*m*) to award fellowships, travelling fellowships, scholarships, studentships, bursaries, exhibitions, medals and prizes in accordance with the Statutes;

(*n*) to charge and collect such fees as may be prescribed;

(*o*) to conduct the University examinations and approve and publish the results thereof;

(*p*) to make ordinances regarding the admission of students to the University or prescribing examinations to be recognized as equivalent to University examinations;

(*q*) to appoint members to the Boards of Studies;

(*r*) (i) to appoint examiners after consideration of the recommendations of the Boards of Studies; and

(ii) to fix their remuneration;

(*s*) to supervise and control the residence and discipline of the students of the University and make arrangements through the colleges for securing their health and well-being;

(*t*) to manage the University laboratories, libraries, institutes of research and other institutions established by the University;

(*u*) to manage hostels instituted by the University;

(*v*) to manage constituent colleges instituted by the University;

(*w*) to manage any Publication Bureau, Employment Bureau, Students' Union, University Extension Board or University Athletic Club instituted by the University;

(*x*) to exercise such other powers and perform such other duties as may be conferred or imposed on it by this Act, or the Statutes, Ordinances or Regulations; and

(*y*) to delegate any of its powers to the Vice-Chancellor, to a Committee from among its own members or to a Committee appointed in accordance with the statutes."

Amendment of the heading of Chapter V of Madras Act VII of 1923.

21. In the heading to Chapter V of the said Act for the words "and The Council of Affiliated Colleges" the words "The Boards of Studies and Other Authorities" shall be substituted.

Substitution of new section for section 23 of Madras Act VII of 1923.

22. For section 23 of the said Act, the following section shall be substituted, namely:—

The Academic Council.

"23. (*a*) The members of the Academic Council in addition to the Vice-Chancellor shall be—

CLASS I—EX-OFFICIO MEMBERS.

(1) The Director of Public Instruction, Madras;

(2) The University Professors;

(3) The heads of University Departments of Study and Research;

(4) The Librarian of the University Library;

(5) The Principals of first-grade colleges;

(6) The Principals of professional colleges;

(7) The Principals of constituent second-grade colleges;

(8) Readers of the University appointed under clause (*g*) of section 19;

(9) Members of the Senate nominated under clause (12) of class III of sub-section (*a*) of section 14; and

(10) Members of the Syndicate who are not otherwise members of the Academic Council.

CLASS II—OTHER MEMBERS.

(1) Six members elected by the Principals of affiliated second-grade colleges from among themselves;

(2) Five members elected by the Senate from its own body who are not engaged in teaching;

(3) Three teachers of each of the honours colleges and of the Madras Medical College to be elected by the teachers in such college;

(4) Two teachers of each of the first-grade and professional colleges (other than honours colleges and the Madras Medical College) to be elected by the teachers in such college;

(5) Three persons elected from among themselves by the headmasters of high schools recognized by the Local Government;

(*b*) Save as otherwise provided, elected and nominated members of the Academic Council shall hold office for a period of three years from the date of the election or nomination as the case may be;

Provided however that no member elected in his capacity as a member of a particular electorate shall hold office for a longer period than three months after he has ceased to be such member unless meanwhile he again becomes a member of that electorate;

Provided also that where an elected or nominated member of the Academic Council is appointed temporarily to any of the offices by virtue of which he is entitled to be a member of the Academic Council *ex-officio*, he shall by notice in writing signed by him and communicated to the Vice-Chancellor within seven days from the date of his taking charge of his appointment, choose whether he will continue to be a member of the Academic Council by virtue of his election or nomination or whether he will vacate office as such member and become a member *ex-officio* by virtue of his appointment and the choice shall be conclusive. On failure to make such choice, he shall be deemed to have vacated his office as an elected or nominated member;

Provided also that a member elected under clause (2) of class II of sub-section (*a*) shall cease to be a member of the Academic Council if he subsequently becomes engaged in teaching."

(*c*) When a person ceases to be a member of the Academic Council he shall cease to be a member of any of the authorities of the University of which he may happen to be a member by virtue of his membership of the Academic Council.

Substitution of new section for section 24 of Madras Act VII of 1923

23. For section 24 of the said Act, the following section shall be substituted, namely:—

"24. Subject to the provisions of this Act the Academic Council shall have the following powers, namely:— Powers of the Academic Council.

(a) to make regulations and amend or repeal the same;

(b) to advise the Senate and the Syndicate on all academic matters;

(c) to make proposals to the Senate and the Syndicate for the institution of professorships, readerships, lectureships, or other teaching posts and in regard to the duties and emoluments thereof;

(d) to make regulations regarding the special courses of study or division of subjects in constituent, affiliated and oriental colleges;

(e) to make regulations for the encouragement of co-operation and reciprocity among constituent, affiliated and oriental colleges with a view to promoting academic life;

(f) to make regulations regarding courses of study, examinations and the conditions on which students of constituent, affiliated and oriental colleges shall be admitted to examinations of the University;

(g) to constitute Faculties in Arts, Science, Law, Medicine Engineering, Technology, Teaching, Agriculture, Commerce, Oriental Learning, Indian System of Medicine, Fine Arts and such other subjects as may be prescribed;

(h) to make proposals to the Syndicate for the framing of Ordinances for the management of University laboratories, libraries and institutes of research, constituent colleges and hostels instituted by the University and other institutions established by the University;

(i) to recommend to the Senate schemes for the constitution or reconstitution of departments of teaching;

(j) to promote research within the University and to call for reports on such research from the persons engaged therein and to make recommendations to the Syndicate thereon; and

(k) to appoint a Standing Committee of which not less than one-third shall be members of the Academic Council who are Principals or teachers of affiliated colleges and to delegate to it such of its powers as it may deem fit."

24. For section 25 of the said Act, the following section shall be substituted, namely:— Substitution of new section for section 25 of Madras Act VII of 1923.

"25. The University shall include Faculties of Arts, Science, Law, Medicine, Engineering, Teaching, Agriculture, Commerce, Oriental Learning, Fine Arts, and such other Faculties as may be prescribed by the Statutes. Each Faculty shall comprise such de- The Faculties.

partments of teaching as may be prescribed by the Ordinances. The constitution and functions of the Faculties shall in all other respects be prescribed by the Regulations; provided that not less than three-fourths of the total number of members of every Faculty shall be members of the Academic Council."

Insertion of new section 25-A in Madras Act VII of 1923.

25. After section 25 of the said Act, the following section shall be inserted, namely:—

The Boards of Studies.

"25-A. There shall be Boards of Studies attached to each department of teaching. The constitution and powers of the Boards of Studies shall be prescribed by the Ordinances."

Repeal of sections 26 and 27 of Madras Act VII of 1923.

26. Sections 26 and 27 of the said Act shall be omitted.

Amendment of section 28 of Madras Act VII of 1923.

27. In section 28 of the said Act, for the word 'authorities' where it first occurs, the word 'bodies' shall be substituted.

Amendment of section 29 of Madras Act VII of 1923.

28. In section 29 of the said Act—

(i) for clause (*c*) the following clause shall be substituted:—

"(*c*) the conditions of recognition of constituent colleges, of affiliation to the University of Affiliated Colleges and of approval of institutions as Oriental Colleges";

(ii) clauses (*e*) and (*m*) shall be omitted and clauses (*f*), (*g*), (*h*), (*i*), (*j*), (*k*), (*l*) and (*n*) re-lettered as (*e*), (*f*) (*g*), (*h*), (*i*), (*j*), (*k*) and (*l*) respectively.

(iii) for clause (*e*) as so re-lettered the following clause shall be substituted, namely:—

"(*e*) the powers, duties and conditions of service of the officers of the University other than the Chancellor and the Pro-Chancellor";

(iv) for clause (*h*) as so re-lettered, the following clause shall be substituted, namely:—

"(*h*) the administration of endowments and the institution and conditions of award of fellowships, travelling fellowships, scholarships, studentships, bursaries, exhibitions, medals and prizes"; and

(v) in clause (*k*) as so re-lettered,, after the word 'graduates' at the end, the word 'and' shall be added.

29. In section 30 of the said Act— Amendment of section 30 of Madras Act VII of 1923.

(i) sub-sections (1) and (2) shall be omitted and sub-sections (3) to (6) re-numbered as (1) to (4) respectively; and

(ii) in clause (*b*) of sub-section (4) as so re-numbered the words 'and the Council of Affiliated Colleges' shall be omitted.

30. In section 31 of the said Act— Amendment of section 31 of Madras Act VII of 1923.

(i) clause (*b*) shall be omitted and clauses (*c*) to (*j*) re-lettered as (*b*) to (*i*) respectively;

(ii) for clause (*c*) as so re-lettered the following clause shall be substituted, namely:—

"(*c*) the conditions of recognition of hostels not maintained by the University";

(iii) in clause (*d*) as so re-lettered, the word 'number' shall be omitted;

(iv) in clause (*e*) as so re-lettered, the words 'for admission to the examinations, degrees and diplomas of the University and for the registration of graduates' shall be omitted; and before the words 'for tutorial and supplementary instruction' the word 'and' shall be inserted;

(v) in clause (*f*) as so re-lettered, after the word 'constituent' the words 'affiliated and oriental' shall be inserted.

31. For sub-section (1) of section 32 of the said Act, the following sub-section shall be substituted, namely:— Amendment of section 32 of Madras Act VII of 1923.

"32. (1) In making Ordinances the Syndicate shall consult—

(i) the Boards of Studies when such Ordinances affect the appointment and duties of examiners, and

(ii) the Academic Council when they affect the conduct or standard of examinations, or the conditions of residence of students."

32. In section 35 of the said Act— Amendment of section 35 of Madras Act VII of 1923.

(i) In sub-section (2) for the words 'recognized by the Senate' the words 'recognized by the Syndicate' shall be substituted.

(ii) in sub-section (3) the words 'or hostel' in the two places where they occur shall be omitted; and

(iii) after sub-section (3) the following sub-section shall be inserted as sub-section (4), namely:—

"(4) The Syndicate shall have power to suspend or withdraw the recognition of any hostel which may not be conducted in accordance with the conditions prescribed, provided that no such action shall be taken without affording the management of such hostel an opportunity of making such representation as it may deem fit."

Amendment of section 36 of Madras Act VII of 1923.

33. In section 36 of the said Act—

(i) In sub-section (1) for the word 'Madras' the words 'the University of Madras' shall be substituted; and

(ii) In sub-section (2) for the words 'constituent college or of an affiliated college' the words 'constituent, affiliated or oriental college' shall be substituted.

Substitution of new section for section 38 of Madras Act VII of 1923.

34. For section 38 of the said Act, the following section shall be substituted, namely.—

Filling of vacancies.

"38. All vacancies among the members (other than *ex-officio* members) of any authority or other body of the University shall be filled as soon as conveniently may be by the individual or electorate who nominated or elected the member whose place has become vacant."

Substitution of new section for section 42 of Madras Act VII of 1923.

35. For section 42 of the said Act, the following section shall be substituted, namely:—

Constitution of committees.

"42. All the authorities of the University shall have power to appoint committees and to delegate to them such of their powers as they deem fit; such committees shall, unless there be some special provision in this Act to the contrary, consist of such members of the authority concerned and of such other persons, if any, as the authority in each case may think fit."

Amendment of section 44 of Madras Act VII of 1923.

36. For clause (*b*) of the second paragraph of section 44 of the said Act, the following clause shall be substituted, namely:—

"(*b*) a sum of at least two lakhs of rupees on such conditions as the Local Government may impose towards the salary, if any, of the Vice-Chancellor, the development of laboratories, libraries, museums and workshops and the salaries of such teachers of the University as are appointed for higher research and for the advancement and dissemination of knowledge in particular branches of learning."

Amendment of section 51 of Madras Act VII of 1923.

37. In section 51 of the said Act, for the word 'property' the word 'properties' shall be substituted.

Repeal of section 54 of Madras Act VII of 1923.

38. Section 54 of the said Act shall be omitted.

Repeal of Schedule I to Madras Act VII of 1923.

39. Schedule I to the said Act shall be omitted.

40. The Statutes, Ordinances and Regulations in force at the time of commencement of this Act shall continue to be in force until they are replaced by Statutes, Ordinances or Regulations framed under the said Act as amended by this Act.

Existing Statutes, Ordinances and Regulations to continue in force till replaced.

41. In their application to the members of the Senate, Syndicate and Academic Council in office at the commencement of this Act and the first reconstitution of these authorities in accordance therewith, the provisions of the said Act and of this Act shall be read subject to the rules contained in the Schedule.

Transitory provisions *re* existing members of Senate, Syndicate and Academic Council.

THE SCHEDULE.

Transitory provisions.

1. The Local Government shall fix a date, not later than the 31st day of March, 1930, on which the term of office of members of the Senate, Syndicate and Academic Council holding office at the commencement of this Act shall expire.

2. Any vacancy in the office of member of the Senate, Syndicate or Academic Council which is in existence at the commencement of this Act or, which occurs before the date fixed under rule 1 shall be filled up in the same manner as it would have been filled up if this Act had not been passed:

Provided that any person elected or appointed as member under this rule shall hold office only up to the date referred to in rule 1.

Provided however that the Syndicate may decide to have no election in the case of vacancies that may last for less than three months.

3. The Vice-Chancellor shall cause arrangements to be made for the election or appointment of members of the Senate, Syndicate and Academic Council so that the newly elected and appointed members may come into office on the date fixed under rule 1 for the expiry of the term of office of members holding office at the commencement of this Act.

4. No acts or proceedings of the Academic Council reconstituted under this Act shall be deemed to be invalid by reason only of non-compliance with the provisions of clause (2) of class II of sub-section (*a*) of section 23 of the said Act as amended by this Act.

5. If any difficulty arises as to the reconstitution of the Senate, Syndicate or Academic Council under this Act, the Local Government, as occasion may require, may, by order, do anything which appears to them necessary for the purpose of removing the difficulty.

THE MADRAS CITY POLICE (AMENDMENT) ACT, 1929.

ACT No. XIII OF 1929.

PREFATORY NOTE.—The following extracts from the Statement of Objects and Reasons would show the circumstances under which this Act was passed:—

"It has come to the notice of Government that what are popularly known as "bucket shops" have sprung up in the City of Madras for the purpose of facilitating betting in connection with horse-races These "bucket shops" have led to much fraud and the deceit practised by them on the general public has been extensive Wherever they are styled clubs and the betting is confined to members, there is no provision under which action could be taken against them. In Bombay and Bengal, legislation has been undertaken to suppress such organizations, in the Bombay Prevention of Gaming (Amendment) Act, 1922, and the Bengal Public Gaming (Amendment) Act, 1913. A Committee was appointed by the Government of Madras to report on the extent of the evil in the City of Madras and the lines on which legislation should be undertaken That Committee was of opinion that mere control of such bucket shops was not practicable and that the object of legislation should be to suppress them altogether, that such legislation should be confined to the City of Madras, that the best way to legislate on a matter like this was to amend the Madras City Police Act, 1888. The Government have accepted the views of this Committee and the present Bill to amend the City Police Act is intended to carry out the recommendations of the Committee and the suggestions of the Commissioner."—*Fort St. George Gazette*, Part IV, dated 18th January, 1929.

[*8th November*, 1929.]

An Act further to amend the Madras City Police Act, 1888.

Preamble. WHEREAS it is expedient further to amend the Madras City Police Act, 1888, for the purpose of controlling betting and wagering on horse-races; it is hereby enacted as follows:—

Short title. 1. This Act may be called THE MADRAS CITY POLICE (AMENDMENT) ACT, 1929.

Amendment of section 3, Madras Act III of 1888. 2. In section 3 of the Madras City Police Act, 1888 (hereinafter referred to as the said Act), after the definition of 'Common Gaming-house', the following definitions shall be inserted, namely:—

'Gaming.' 'Gaming' does not include a lottery but includes wagering or betting on a horse-race except when such wagering or betting takes place—

(i) on the date on which such race is to be run; and

(ii) in a place or places within the race enclosure which the authority controlling such race has with the sanction of the Local Government set apart for the purpose.

'Instruments of gaming.' 'Instruments of gaming' include an article used as a subject, or means of, or for the purpose of carrying on or facilitating, or in connection with gaming and any books, lists, tickets, forms or other

documents used or intended to be used as a register or record or evidence of gaming.

3. Section 37 of the said Act shall be renumbered as sub-section (1) of section 37 and to that section as so renumbered, the following sub-sections shall be added, namely:— Amendment of section 37, Madras Act III of 1888.

"(2) Whoever opens, keeps or uses, or permits to be opened, kept, or used any enclosure, room or place for the purpose of gaming on a horse-race, shall be liable, on conviction, to imprisonment not exceeding three months or for every day on which such enclosure, room or place is so opened, kept or used, to a fine not exceeding five hundred rupees or to both.

(3) Whoever is found gaming on a horse-race shall be liable, on conviction, notwithstanding any provision to the contrary in this Act, to a fine not exceeding five hundred rupees or to imprisonment not exceeding one month."

4. In sections 42 and 43 of the said Act, for the words 'enclosed place or building' wherever they occur, the word 'place' shall be substituted. Amendment of sections 42 and 43, Madras Act III of 1888.

5. In section 44 of the said Act, after the word 'wager' the word 'bet' shall be inserted. Amendment of section 44, Madras Act III of 1888.

6. In section 51 of the said Act, after the word 'wagers' the word 'bets' and after the word 'wagering' the words 'or betting' shall be inserted. Amendment of section 51, Madras Act III of 1888.

THE MADRAS MEDICAL REGISTRATION (SECOND AMENDMENT) ACT, 1929.

ACT No. XIV OF 1929.

PREFATORY NOTE—The following is the Statement of Objects and Reasons appended to the Bill:—

"Under sub-section (1) of section 5 of the Madras Medical Registration Act, 1914 (Madras Act IV of 1914), the University of Madras is represented on the Madras Medical Council by the appointment of (i) one member elected by the Medical Faculty of the Senate, and (ii) three members elected by the registered practitioners who are graduates in medicine of the Madras University. The Andhra University is not represented on the Council as the University came into existence after the passing of the Madras Medical Registration Act, 1914. It is considered desirable that provision should be made for the representation of the Andhra University also on the Madras Medical Council. The proposal is to redistribute the four seats referred to above between the Madras and the Andhra Universities so as to allot one member to the Faculty of Medicine of each of the Universities and two members to the registered practitioners who are graduates in medicine of any of

these Universities. The total strength of the Council is not thus affected by the change. The Bill gives effect to this proposal by amending sub-section (1) of section 5 of the Medical Registration Act, 1914 (Madras Act IV of 1914).

Under the Madras University Act, 1923 (Madras Act II of 1923) and the Andhra University Act, 1925 (Madras Act II of 1926), Faculties are of the University and not of the Senate Every Faculty should be constituted from among the Academic Council. The prescription of the constitution and functions of Faculties by statutes alone vests with the Senate The present opportunity has therefore been taken to describe the Faculty as "the Faculty of Medicine of the University of Madras" instead of as "the Medical Faculty of the Senate of the University of Madras" occurring in clause (*b*) of sub-section (1) of section 5 of the Madras Medical Registration Act, 1914 (Madras Act IV of 1914) "—*Fort St. George Gazette*, Part IV, dated 27th April, 1929.

[*15th November,* 1929.]

An Act further to amend the Madras Medical Registration Act, 1914, *for certain purposes.*

Preamble.

WHEREAS it is expedient further to amend the Madras Medical Registration Act, 1914, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS MEDICAL REGISTRATION (SECOND AMENDMENT) ACT, 1929.

Amendment of section 5, Madras Act IV of 1914.

2. In sub-section (1) of section 5 of the Madras Medical Registration Act, 1914—

(i) for clause (*b*) the following clauses shall be substituted, namely:—

"(*b*) one member elected by the Faculty of Medicine of the University of Madras;

(*bb*) one member elected by the Faculty of Medicine of the Andhra University"; and

(ii) in clause (*d*)—

(*a*) for the words "three members" the words "two members" shall be substituted, and

(*b*) after the words "the University of Madras" at the end, the words "or of the Andhra University" shall be added.

THE MADRAS VILLAGE COURTS (AMENDMENT) ACT, 1929.

ACT No. XV OF 1929.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons appended to the Bill:—

"There is no provision in the Madras Village Courts Act, 1888, under which a decree passed by a village court subject to the jurisdiction of one District Munsif can be transmitted for execution to another District Munsif. In pursuance of a promise made by the Government in answer

to a question asked at the meeting of the Legislative Council held on the 31st October 1927, it is proposed to amend section 66 of the Act to achieve the above object The opportunity is taken to make it clear that a District Munsif who receives a decree passed by a village court for execution can transmit it for execution only to the court of any village lying within his jurisdiction and not to the court of any village outside it. It is possible that a doubt may arise whether an order passed by a District Munsif under section 66 or 67 of the Madras Village Courts Act, 1888, relating to the attachment or sale of moveable property in execution of a decree passed by a village court would not be liable to appeal by virtue of section 96 of the Code of Civil Procedure, 1908, read with section 2 of that Code, whereas a similar order made by a village court in execution of a decree passed by such court would be final subject to the right of revision by the District Munsif under section 73 of the Madras Village Courts Act. Clause 3 is put in to obviate such a doubt.—*Fort St George Gazette,* Part IV, dated 5th February, 1929

[*9th November,* 1929.]

An Act further to amend the Madras Village Courts Act, 1888.

Preamble.

WHEREAS it is expedient further to amend the Madras Village Courts Act, 1888, for the purpose hereinafter appearing; and whereas the previous sanction of the Governor-General has been obtained to the passing of this Act; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS VILLAGE COURTS (AMENDMENT) ACT, 1929.

Substitution of new section for section 66, Madras Act I of 1889.

2. For section 66 of the Madras Village Courts Act, 1888, hereinafter referred to as the said Act, the following section shall be substituted, namely:—

Transmission of decree and execution of transmitted decree.

"66. (1) Any decree passed by a village court may, on the application of the decree-holder, be transmitted for execution to the District Munsif who may—

(*a*) execute the decree as if it were a decree passed by himself; or

(*b*) transmit it for execution to the court of any other village within his jurisdiction in which the defendant is represented to have movable property; or

(*c*) transmit it to the court of any other District Munsif within whose jurisdiction the defendant is represented to reside or to have property.

(2) The District Munsif to whom a decree has been transmitted under clause (*c*) of sub-section (1) may execute the decree as if it were a decree passed by himself, or transmit it for execution to the court of any village within his jurisdiction in which the defendant is represented to have movable property.

(3) The village court to which the decree is transmitted under clause (*b*) of sub-section (1) or sub-section (2) shall proceed as if the decree was passed by itself."

Insertion of new section 67-A in Madras Act I of 1889.

3. After section 67 of the said Act, the following section shall be inserted, namely:—

Orders of the District Munsif relating to attachment or sale of movable property not appealable.

"67-A. Notwithstanding anything contained in the Code of Civil Procedure, 1908, no appeal shall lie from any order made by a District Munsif relating to the attachment or sale of movable property in execution of any decree passed by a village court."

THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1929.

ACT NO. XVI OF 1929.

[15th *November*, 1929.]

An Act further to amend the Andhra University Act, 1925.

Preamble.

WHEREAS it is expedient further to amend the Andhra University Act, 1925, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1929.

Amendment, of section 30, Madras Act II of 1926.

2. To section 30 of the Andhra University Act, 1925 (hereinafter referred to as the said Act), the following proviso shall be added, namely:—

"Provided that vacancies arising by efflux of time among elected members of any authority or body of the University may be filled at elections which may be fixed by the Vice-Chancellor to take place on such days, not earlier than two months from the date on which the vacancies arise, as he thinks fit."

Completion of courses of study of students preparing for examinations of the Andhra University.

3. Notwithstnding anything contained in the said Act or in the Ordinances framed thereunder,

(i) any student of a college in the present districts of Bellary, Anantapur, Cuddapah, Kurnool or Chittoor affiliated to the Andhra University before the coming into force of the Andhra University (Amendment) Act, 1929, who was studying for any examination of the Andhra University, or

(ii) any student who is admitted during the academic year 1929-30 into any such college to study for any examination of the Andhra University

Shall be permitted to complete his course in preparation therefor and the Andhra University shall hold for such student examinations in accordance with the curricula of studies of that University for a period of five years beginning on the second day of July 1929 and confer degrees and other academic distinctions to which such student will be entitled on his passing the said examinations if the said Andhra University (Amendment) Act, 1929, had not come into force.

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THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.

ACT No. II OF 1929.

PREFATORY NOTE.—The following extracts from the Statement of Objects and Reasons would show the necessity for the passing of this Act:—

(1) This Bill is a revival of a similar Bill introduced by the late Mr. T. V. Seshagiri Aiyar and passed by the first Assembly on the 27th March, 1923. Its consideration in another place was moved on the 19th July, 1923, but postponed to the next session, when no further action being taken, the Bill was suffered to lapse.

(2) The Bill is intended to remove a sex disqualification which under the archaic rules of Hindu Law excludes one's nearest female relations, *e.g.*, the sister, the son's daughter and the daughter's daughter, from inheritance altogether, while it gives the sister's son a very low place among *bandhus* who can only take in the absence of *gotraja sapindas* and *samanodaks*, that is to say, the owner's agnatic relations even up to the 14th and later degrees, which gives him a very poor chance of succession in many cases. This condition is somewhat ameliorated in the case of persons subject to the Mayukh law where usage has given female heirs a somewhat better position, though in the case of persons subject to the Dayabagh School of law certain *bandhus* are not considered inferior to the *gotrajas*: still even under that system the sister is not an heir though the sister's son is expressly mentioned in the Dayabagh as the heir while the son's daughter and the daughter's daughter have no place at all. In fairness to Bengal the Bill should have been extended even to that Province but an objection was taken in the first Assembly to its extension to that Province and its provision was, therefore, restricted to the two Provinces of the Mitakshara country.

(3) The Bill is intended to include the son's daughter, daughter's daughter, and the sister amongst heritable *bandhus* which they are not under the Hindu Law, and improves the position of the sister's son by placing him immediately after the grandfather but before the grand uncle.

(4) This does not exhaust a very large number of female relations, *e.g.*, the son's son's daughter, the brother's daughter, the sister's daughter, who still remain outside the pale of heritable *bandhus*. But the Bill being merely a revival of the Bill already passed by the Assembly it is not proposed to enlarge upon its provisions for the present, though the whole law of Hindu inheritance is unsatisfactory and does not follow the line of affinity and affection, placing as it does agnatic kinsmen however remote above all cognatic relations however near.

(5) The Bill will not make any serious inroad upon the law as understood in the Province subject to Mayukh, nor will it seriously affect the law as understood in the Province of Madras where female *bandhus* are allowed to rank but only after all the male *bandhus* are exhausted.

(6) The previous Bill passed by this Assembly was limited only to the two Provinces of Madras and United Provinces, but the reason for this limitation is not understood nor was it clear to the Council of State who gave it as one of their reasons for postponing its consideration. The Act is thus intended to rectify a glaring injustice to one's nearest relations in matters of inheritance.—(*Fort St. George Gazette*, Part III, 10th April, 1928, p. 187.)

[21st February, 1929.]

An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

WHEREAS it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

Order of succession of certain heirs.

2. A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother:

Provided that a sister's son shall not include a son adopted after the sister's death.

Savings.

3. Nothing in this Act shall—

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

THE PRESIDENCY-TOWNS INSOLVENCY (AMENDMENT) ACT, 1929.

ACT NO. III OF 1929.

PREFATORY NOTE.—"Sub-section (2) of old section 69 of the Presidency-towns Insolvency Act, 1909 (III of 1909), required the Official Assignee to declare and distribute the first dividend (if any) within six months after the adjudication, unless he satisfied the Court that there was sufficient reason for postponing the declaration to a later date This provision had proved in practice to be unworkable in Madras, and the Local Government proposed to introduce a Bill in the local Legislative Council to amend the section so as to extend the period from six months to one year. As, however,

the difficulty was not confined to Madras, it was considered desirable, in the interests of uniformity, to undertake central legislation to give effect to the proposal. This Act was, therefore, brought forward with the concurrence of the Local Governments concerned."—(*Statement of Objects and Reasons*)

[*22nd March*, 1929.]

An Act further to amend the Presidency-towns Insolvency Act, 1909, for a certain purpose.

WHEREAS it is expedient further to amend the Presidency-towns Insolvency Act, 1909, for the purpose hereinafter appearing; It is hereby enacted as follows:—

1. This Act may be called THE PRESIDENCY-TOWNS INSOLVENCY (AMENDMENT) ACT, 1929. Short title.

2. In sub-section (2) of section 69 of the Presidency-towns Insolvency Act, 1909, for the words "six months" the words "one year" shall be substituted. Amendment of section 69, Act III of 1909.

THE INDIAN TARIFF (AMENDMENT) ACT, 1929.

ACT No. IV OF 1929.

PREFATORY NOTE—In its Report on the question of tariff equality in respect of the manufacture of electric wires and cables, the Tariff Board recommended that a duty of 5 per cent *ad valorem* should be imposed on all classes rubber-insulated wires and cables other than those specified in Item 90-A of the import Tariff Schedule.

In its Report on the question of tariff equality in respect of the manufacture of printing type, the Tariff Board recommended that the import duty on printing type should be changed from 2½ per cent. *ad valorem* to a specific duty of one anna per lb.

The object of this Act is to give effect to these recommendations—(See *Statement of Objects and Reasons*)

[*22nd March*, 1929.]

An Act further to amend the Indian Tariff Act, 1894, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Tariff Act, 1894, for the purpose of altering the import duty upon printing type and of imposing an import duty upon rubber-insulated copper wires and cables not already dutiable; It is hereby enacted as follows:—

1. (1) This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1929. Short title and commencement.

(2) It shall come into force on the 1st day of April, 1929.

2. In the Second Schedule to the Indian Tariff Act, 1894, the following amendments shall be made, namely:— Amendments to Schedule II Act VIII of 1894.

(1) Item No. 43B shall be re-numbered as No. 43C, and after Item No. 43A the following item shall be inserted under the heading "Machinery," namely:—

"43B	RUBBER INSULATED COPPER WIRES AND CABLES, no core of which has a sectional area of less than one-eighteth part of a square inch, whether made with any additional insulating or covering material or not.	*Ad valorem* ..	5 per cent."

(2) After Item No. 45B, the following item shall be inserted under the heading "Miscellaneous," namely:—

"46	PRINTING TYPE	Pound ..	One anna."

(3) In Item No. 54, the word "type" shall be omitted.

THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1929.

ACT NO. V OF 1929.

PREFATORY NOTE—The necessity for the passing of this Act has been stated as follows:—

"The Workmen's Compensation Act, 1923, came into force on the 1st July, 1924 Since then a number of amendments have suggested themselves or have been proposed by Commissioners for Workmen's Compensation and Local Governments. Some of the latter proposals involve the modification of the principles underlying the present Act or of its more important features So far as these are concerned, the Government of India consider it advisable to consult Local Governments and the public generally before forming conclusions. For the present it is proposed to limit the revision of the Act to the amendment of those sections or parts of sections which are admittedly defective and to the introduction of changes which are likely to raise no important controversial points and which will be generally recognized as improvements. The proposed amendments are explained in the Notes on Clauses below.

NOTES ON CLAUSES.

Clause 2.—The definition of 'workman' in existing section 2 (1) (*n*) of the Act includes persons who are employed by a Railway administration in connection with the service of a railway, but excludes persons employed on similar work by a person fulfilling a contract with a Railway administration. It was never intended that contractors' employees should be outside the scope of the Act on Railways; they come within the Act in all the other classes of employment to which the law extends. The amendment seeks to remove an obvious defect in the law.

Clause 3—Compensation to workmen employed in the construction, repair or demolition of a building or bridge was originally restricted on grounds of expediency to cases of death and permanent total disablement as it was feared that any general application of the Act to the building trades might lead to administrative difficulties Experience of the working of the Act has shown that no such result need be anticipated, especially in view of the restrictions imposed by clause (*vi*) of Schedule II of the Act. The amendment seeks to remove the discrimination contained in the existing proviso (*c*) to sub-section (1) of section 3 of the Act against such workmen.

Clause 4.—(1) Cases have been reported in which the application of the existing section 5 (*b*) gives results which are wide of the true average wages in the case of workmen whose period of service immediately preceding the accident is less than a month The amendment seeks to remove this anomaly.

(2) The existing section 5 prescribes the manner in which the monthly wages of a workman shall be calculated for the purpose of section 4. The amendment is designed to extend the same method to the calculation of wages for the purposes of clause (*n*) of sub-section (1) of section 2 and of sub-section (3) of that section.

Clause 5—Sub-section (1) of section 8 as at present worded is liable to misinterpretation. The amendment seeks to clarify the real intention which is that all payments to dependants of the deceased workman must be made through the Commissioner and not directly to the dependants. The opportunity has been taken to provide that any lump sum payable as compensation to a minor should also be paid similarly through the Commissioner. The revised section further provides for—

(*a*) the protection of lump sums payable to a woman or to a person (other than a minor) under any legal disability,

(*b*) the prevention of deposits of trivial amounts, and

(*c*) the investment of sums payable as compensation to women.

It is also proposed to remove the apparent inconsistency between the existing sub-section (5) and the existing sub-section (2) and between sub-section (1) which might be read as requiring the Commissioner to pay the full sum to a dependant, and sub-section (4) which enables him to deduct funeral expenses.

Clause 6—The amendment is designed to vest Commissioners with the same powers in respect of the prosecution of persons for perjury as are possessed by Civil Courts generally

Clause 7.—The existing sub-section (1) of section 28 provides *inter alia* for the registration of agreements which settle the compensation payable to persons under legal disability The provision is not necessary in the case of persons who are over 15 years of age and suffer from no other legal disability, the Act treats such persons as adults for purposes of compensation The amendment also provides for the repeal of proviso (*b*) which has in practice remained a dead letter.

Clause 8.—(1) The application of the Workmen's Compensation Act to dock labourers, etc., is governed partly by existing clause (*v*) of Schedule II of the Act and partly by a notification issued by the Governor-General in Council under section 2 (3) of the Act The two provisions are not entirely consistent, as the former applies only to places where steam, water or other mechanical power or electrical power is used, whereas the latter imposes no such restriction. The revised clause consolidates the provisions of the existing clause (*v*) and of the notification and eliminates the condition relating to the use of power. The revised clause will now include all persons employed for the purpose of loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting a ship irrespective of the place where the ship may be.

(2) The amendment to clause (*vii*) of this Schedule is designed to include in the scope of the Act persons employed in setting up, repairing, maintaining or taking down a post or standard supporting an overhead electric cable Persons employed in setting up, etc, posts supporting telegraph and telephone lines are already included in the existing clause (*vii*) and the omission of the former class of persons was unintentional

(3) Certain classes of workmen who have been brought within the scope of the Act by notifications issued under sub-section (3) of section 2

of the Workmen's Compensation Act have also been included in the Schedule."—(*Statement of Objects and Reasons*)

The following is the Report of the Select Committee on the Bill:—

Clause 2—This clause has been justly criticised on the ground that the proposed definition, as applied to the railway servants referred to in sub-clause (*i*) of clause (*n*) of section 2 (1) of the Act, will not necessarily include persons employed upon new lines under construction and upon railways not used for the carriage of passengers and goods such as are referred to in sub-section (1) of section 148 of the Indian Railways Act, 1890, and also on the further ground that it would include persons employed by contractors otherwise than by way of manual labour or on wages exceeding three hundred rupees. We think we have met this criticism by the omission of this clause and the insertion of a new clause in Schedule II of the Act all the entries in which Schedule are subject to the qualification as regards manual labour and limit of wages referred to above. The new clause which we propose will be found in clause 8 of the Bill (now clause 7) The remaining clauses of the Bill have been re-numbered accordingly.

Clause 3 (*now clause* 2)—The amendment which we have made in this clause is of a purely drafting nature.

Clause 4 (*now clause* 3).—The method by which the Bill sought to deal with the case of a casual labourer or a workman who is injured after having been for less than a month in the service of an employer has been criticised both by employers and by representatives of workmen. On the one hand, it is pointed out that workmen of this class will, owing to inexperience, often be drawing less wages than other workmen performing similar tasks; on the other hand, it is feared that, in the absence of more perfect machinery for the determination of wages in such cases, disputes and ill-feeling might arise and that pressure might be brought by employers upon other workmen to state the wages of the injured workman at a lower figure than that at which they had actually been paid. On the whole, we consider that the question requires further consideration, and we understand that it will be re-considered in connection with the more general revision of the Act, the preliminary stages of which have already been undertaken Our decision therefore is to omit clause (*i*) of sub-clause (1) of this clause of the Bill.

Clause 5 (*now clause* 4).—We think there is considerable force in some of the opinions received which are to the effect that the proposed new sub-section (1) of section 8 of the Act would prevent an employer from advancing money to the dependants of a deceased workman either for funeral expenses or for temporary maintenance. We understand that such advances are frequently made, and we are clearly of opinion that it would be in the interests of workmen that they should continue to be legal, at any rate up to a certain amount We have accordingly made an exception to meet this case which will allow an employer to advance not more than fifty rupees on account of funeral expenses, and not more than one hundred rupees to any one dependant of a deceased workman for maintenance. It will be observed that the advance for funeral expenses may be deducted by the employer from the amount which he has to deposit with the Commissioner, whilst in the case of an advance for maintenance the employer will be required to deposit the full sum and will be entitled to repayment to the amount only of the compensation awarded to the dependant. This will ensure a decision by the Commissioner of any dispute as to the amount actually advanced.

We have further decided to extend the provisions of the new sub-section (1) to the case of the payment of a lump sum to any woman worker, as we think that in many cases the female labourer requires as much protection as a minor, and also to any person who is under a legal disability, and not only to a minor as defined in the Act. This decision involves the

omission of the proposed new sub-section (2) under which the deposit of compensation payable to a woman or a person, other than a minor, under a legal disability was not compulsory but could be ordered by the Commissioner at his discretion

The omission of the proposed new sub-section (2) involves a certain amount of re-numbering which we have carried out in the Bill attached to our Report, and the decision to legalise advances involves a consequential additional amendment in sub-section (4) of section 8 of the Act.

We have also adopted a suggestion made by the Local Government of Bombay that provision should be made enabling the recovery of any amount which has been paid as compensation to any person through fraud or other improper means.

Clause 7 (*now clause* 6).—As a corollary to the similar amendment which we have made in clause 5 (now clause 4) we have decided to extend the protection which is afforded by compulsory registration of agreements to the cases where compensation settled by agreement is payable to a woman or any person under a legal disability

We have also considered the various representations made that with the omission of clause (*b*) of the proviso to sub-section (1) of section 28 of the Act, the Act no longer contains any provision indicating that a memorandum of agreement can be presented for registration by a workman. We agree that this is so, but we also agree that clause (*b*) of the proviso is otiose as the Act as at present framed makes no definite provision for this case. We have, however, received an assurance that the question of making such provision will be considered in connection with the general revision of the Act to which we have already alluded.

Clause 8 (*now clause* 7).—It has been pointed out that the new clause (*v*) which the Bill proposes to insert in Schedule II of the Act would appear to include members of the crew of a ship registered under the Merchant Shipping Act, 1894, and also the crew of a foreign ship In view of the fact that seamen of registered ships as defined in the Act are already covered by clause (*iv*) of the Schedule, we have made it clear that the clause does not include the master or crew of the ship.

It has also been pointed out that the clause as framed will include some dock labourers but not others. We agree that this appears illogical; but we think it is not a point which we can attempt to meet, until the matter has received full consideration from all interests affected.

The only other alteration which we have made, apart from the addition, to which we have already referred, of a clause to cover labour engaged by railway contractors, is a slight verbal alteration in the proposed amendment to clause (*vii*) of Schedule II.

N B.—The Hon'ble D. Chaman Lall signed the Report of the Select Committee with the addition of the following note:—

"I sign this with the clear understanding that an effective attempt will be made (and that with expedition) to revise the entire Act keeping in view modern legislation existing in civilised countries with especial attention to the clamorous needs of the working classes of India."

[29*th March*, 1929.]

An Act further to amend the Workmen's Compensation Act, 1923, *for certain purposes.*

WHEREAS it is expedient further to amend the Workmen's Compensation Act, 1923, for certain purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1929.

Amendment of section 3, Act VIII of 1923

2. In the proviso to sub-section (1) of section 3 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the said Act), the word "or" at the end of clause (*b*) and the whole of clause (*c*) shall be omitted.

Amendment of section 5, Act VIII of 1923.

3. (1) Section 5 of the said Act shall be re-numbered as sub-section (1) of section 5, and in that sub-section as so re-numbered, in the *Explanation,* for the words "this section" the words "this sub-section" shall be substituted.

(2) To the same section as so re-numbered the following sub-section shall be added, namely:—

"(2) The provisions of sub-section (1), other than the proviso, shall apply to the calculation of wages for the purposes of clause (*n*) of sub-section (1) of section 2 and of sub-section (3) of that section."

Amendment of section 8, Act VIII of 1923.

4. In section 8 of the said Act,—

(*a*) for sub-sections (1) to (3) the following sub-sections shall be substituted, namely:—

"(1) No payment of compensation in respect of a workman whose injury has resulted in death, and no payment of a lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation:

Provided that, in the case of a deceased workman,—

(*a*) an employer may make to any dependant or other person, by whom the funeral expenses are to be or have been incurred, an advance not exceeding fifty rupees for the purpose of defraying the same in whole or in part, and may make other advances to dependants on account of compensation, not exceeding however an aggregate of one hundred rupees in the case of any one dependant;

(*b*) the amount of any advance made in accordance with the provisions of clause (*a*) to defray funeral expenses may be deducted by the employer from the lump sum to be deposited with the Commissioner, and the amount of any other advance so made to a dependant, or so much thereof as does not exceed the compensation apportioned to him, shall be deducted by the Commissioner from such compensation and be repaid to the employer.

(2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.

(3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him";

(b) in sub-section (4), after the words "under sub-section (1)" the words "as compensation in respect of a deceased workman" shall be inserted; and after the words "fifty rupees" the following words shall be inserted, namely:—

"or so much of that cost or of fifty rupees, whichever is less, as has not already been advanced by the employer on account of such expenses";

(c) for sub-section (5) the following sub-sections shall be substituted, namely:—

"(5) Compensation deposited in respect of a deceased workman shall, subject to any deduction made under sub-section (4), be apportioned among the dependants of the deceased workman or any of them in such proportion as the Commissioner thinks fit, or may, in the discretion of the Commissioner, be allotted to any one dependant.

(6) Where any compensation deposited with Commissioner is payable to any person, the Commissioner shall, if the person to whom the compensation is payable is not a woman or a person under a legal disability, and may in other cases, pay the money to the person entitled thereto.

(7) Where any lump sum deposited with the Commissioner is payable to a woman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, or of such person during his disability, in such manner as the Commissioner may direct; and where a half-monthly payment is payable to any person under a legal disability, the Commissioner may, of his own motion or on an application made to him in this behalf, order that the payment be made during the disability to any dependant of the workman or to any other person whom the Commissioner thinks best fitted to provide for the welfare of the workman"; and

(d) sub-section (6) shall be re-numbered as sub-section (8) and after that sub-section the following sub-section shall be added, namely:—

"(9) Where the Commissioner varies any order under sub-section (8) by reason of the fact that payment of compensation to any person has been obtained by fraud, impersonation or other improper means, any amount so paid to or on behalf of such person may be recovered in the manner hereinafter provided in section 31."

Amendment of section 23, Act VIII of 1923.

5. To section 23 of the said Act after the words "material objects" the following words shall be added, namely:—

"and the Commissioner shall be deemed to be a Civil Court for all the purposes of section 195 and of Chapter XXXV of the Code of Criminal Procedure, 1898."

Amendment of section 28, Act VIII of 1923.

6. In sub-section (1) of section 28 of the said Act,—

(*a*) for the words "to a person under a legal disability" the words "to a woman or a person under a legal disability" shall be substituted;

(*b*) clause (*b*) of the proviso shall be omitted; and

(*c*) in clause (*d*), for the words "to a person under any legal disability" the words "to a woman or a person under a legal disability" shall be substituted.

Amendment of Schedule II, Act VIII of 1923.

7. In Schedule II to the said Act,—

(1) for clause (*v*) the following clause shall be substituted, namely:—

"(*v*) employed for the purpose of loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting any ship of which he is not the master or a member of the crew; or";

(2) in clause (*vii*), for the word "cable" the words "line or cable or post or standard for the same" shall be inserted; and

(3) after clause (*ix*) the following clauses shall be added, namely:—

"or

(*x*) employed upon a railway as defined in clause (4) of section 3, and sub-section (1) of section 148, of the Indian Railways Act, 1890, by a person fulfilling a contract with the railway administration; or

(*xi*) employed as an inspector, mail guard, sorter or van peon in the Railway Mail Service; or

(*xii*) employed, in connection with operations for winning natural petroleum or natural gas, as a rig-builder, driller, driller's helper, oil-well puller, or in bailing or cleaning oil-wells or putting in and taking out casings or drill pipes in oil-wells; or

(*xiii*) employed in any occupation involving blasting operations."

Amendment of Schedule IV, Act VIII of 1923.

8. In Schedule IV to the said Act, for the words and letters "clause (*a*) or clause (*b*)" the word and figure "sub-section (1)" shall be substituted.

THE INDIAN FINANCE ACT, 1929.

ACT NO. VI OF 1929.

PREFATORY NOTE—The object of this Act is to continue certain provisions of the Indian Finance Act, 1928, which would otherwise cease to have effect from the 1st April, 1929, and to raise the import and excise duties on motor spirit

"Clauses (2), (3) and (5) of the Bill provide for the continuance of the rates of salt duty, postage, income-tax and super-tax prescribed by the

Indian Finance Act, 1928, while clause (4) provides for the credit to revenue for a further period of one year, *i.e*; till the 31st March, 1930, of interest on securities forming part of the Paper Currency Reserve.

Clause (6) gives effect to one of the main recommendations of the Indian Road Development Committee. The increase in the import and excise duties on motor spirit from 4 annas to 6 annas a gallon is expected to yield an additional revenue of Rs 6 lakhs in 1928-1929 and of about Rs. 83 lakhs in 1929-30 on the assumption that it will not affect consumption It is proposed that such sums should be charged to revenue, in the years in which they accrue, by *per contra* credit to a "Road Development Fund" from which disbursements will be made from time to time for expenditure on road development in accordance with the Committee's recommendations "—(See *Statement of Objects and Reasons*)

[*30th March*, 1929.]

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, *further to amend the Indian Paper Currency Act,* 1923, *to fix rates of income-tax, and to raise the import and excise duties on motor spirit.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, further to amend the Indian Paper Currency Act, 1923, to fix rates of income-tax, and to raise the import and excise duties on motor spirit; it is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) Sections 2 and 3 shall remain in force only up to the 31st day of March, 1930.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor-General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India other than Burma and Aden, be construed as if, with effect from the 1st day of April, 1929, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Postal rates.

3. With effect from the 1st day of April, 1929, the schedule contained in the First Schedule to this to Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act

Amendment of Act X of 1923.

4. In sub-section (7) of section 19 of the Indian Paper Currency Act, 1923, for the figures "1929" the figures "1930" shall be substituted.

Income-tax and super-tax.

5. (1) Income-tax for the year beginning on the 1st day of April, 1929, shall be charged at the rates specified in Part I of the Second Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1929, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Second Schedule.

(3) For the purposes of the Second Schedule, "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

Duties on motor spirit.

6. (1) In Schedule II to the Indian Tariff Act, 1894, in Item No. 40-A, for the words "Four annas" in the entry in the fourth column, the words "Six annas" shall be substituted.

(2) In sub-section (1) of section 3 of the Motor Spirit (Duties) Act, 1917, for the words "four annas" the words "six annas" shall be substituted.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See Section* 3.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See Section* 7.]

Letters.

For a weight not exceeding two and a half tolas ..	One anna.
For every two and a half tolas, or fraction thereof, exceeding two and a half tolas	One anna

Postcards

Single	Half an anna.
Reply	One anna.

Book, Pattern and Sample Packets.

For every five tolas or fractoin thereof	Half an anna.

Registered Newspapers.

For a weight not exceeding eight tolas	Quarter of an anna.
For a weight exceeding eight tolas and not exceeding twenty tolas	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas	Half an anna.

Parcels.

For a weight not exceeding twenty tolas	Two annas.

For a weight exceeding twenty tolas and not exceeding forty tolas	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas	Four annas."

SCHEDULE II.

[*See Section* 5]

PART I.

Rates of Income-tax

	Rate.
A. In the case of every individual Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is less than Rs. 2,000.	*Nil.*
(2) When the total income is Rs. 2,000 or upwards, but is less than Rs 5,000.	Five pies in the rupee.
(3) When the total income is Rs 5,000 or upwards, but is less than Rs. 10,000.	Six pies in the rupee.
(4) When the total income is Rs 10,000 or upwards, but is less than Rs 20,000	Nine pies in the rupee
(5) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna in the rupee.
(6) When the total income is Rs. 30,000 or upwards, but is less than Rs 40,000.	One anna and three pies in the rupee.
(7) When the total income is Rs. 40,000 or upwards	One anna and six pies in the rupee.
B In the case of every company and registered firm, whatever its total income.	One anna and six pies in the rupee.

PART II.

Rates of Super-tax.

	Rate.
In respect of the excess over fifty thousand rupees of total income—	
(1) in the case of every company	One anna in the rupee.
(2) (*a*) in the case of every Hindu undivided family—	
(i) in respect of the first twenty-five thousand rupees of the excess.	*Nil*
(ii) for every rupee of the next twenty-five thousand rupees of such excess.	One anna in the rupee.
(*b*) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company, for every rupee of the first fifty thousand rupees of such excess.	One anna in the rupee.
(*c*) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	

	Rate
(*i*) for every rupee of the second fifty thousand rupees of such excess.	One and a half annas in the rupee.
(*ii*) for every rupee of the next fifty thousand rupees of such excess	Two annas in the rupee.
(*iii*) for every rupee of the next fifty thousand rupees of such excess	Two and a half annas in the rupee
(*iv*) for every rupee of the next fifty thousand rupees of such excess	Three annas in the rupee
(*v*) for every rupee of the next fifty thousand rupees of such excess	Three and a half annas in the rupee.
(*vi*) for every rupee of the next fifty thousand rupees of such excess.	Four annas in the rupee
(*vii*) for every rupee of the next fifty thousand rupees of such excess.	Four and a half annas in the rupee.
(*viii*) for every rupee of the next fifty thousand rupees of such excess	Five annas in the rupee.
(*ix*) for every rupee of the next fifty thousand rupees of such excess.	Five and a half annas in the rupee
(*x*) for every rupee of the remainder of the excess	Six annas in the rupee.

THE TRADE DISPUTES ACT, 1929.

ACT No. VII OF 1929.

PREFATORY NOTE —The following extracts from the Statement of Objects and Reasons indicate the reasons that led up to the passing of the Act:—

"The outbreak of industrial unrest on a large scale was a feature of the period succeeding the close of the War and led the Government of India to explore the possibility of providing some machinery for the settlement of industrial disputes. The inquiries made with this purpose in 1920 led to the conclusion that in the conditions then existing, legislation for this purpose was not likely to be effective.

2 The succeeding years saw a distinct change in the position by reason of the growth of organizations of industrial workers and of the increasing influence exercised by public opinion on the course of disputes And in 1924 the Government of India prepared a draft Bill "for enabling the investigation and settlement of trade disputes" and circulated it in order to ascertain the views of those directly interested and of the public generally on the subject. As a result of the inquiries made in 1924-25 and the experience which has become available since that period, the Government of India are satisfied that legislation for the prevention and settlement of trade disputes is likely to prove of considerable value; and the present Bill has been prepared for this purpose.

3. The main part of the Bill falls into three parts Clauses 3 to 14 relate to the establishment of tribunals for the investigation and settle-

ment of trade disputes. This part of the Bill is based generally on the British Industrial Courts Act of 1919, and its detailed provisions are adopted for the most part from clauses in that Act. The main difference is that, whereas the British Act sets up a Standing Industrial Court, the Conciliation Boards which the Bill proposes to establish are intended to be appointed *ad hoc* like the Courts of Inquiry, in order to deal with particular disputes. The object of Courts of Inquiry which will ordinarily be composed of persons having no direct interest in the dispute will be to investigate and report on such questions connected with the dispute as may be referred to them. The object of Boards of Conciliation, which will ordinarily include representatives of the parties to a dispute, will be to secure a settlement of the dispute. Both Courts of Inquiry and Boards of Conciliation will be able to enforce attendance of witnesses and the production of documents, and their reports are to be published. Neither party will be under any obligation to accept the findings of the Court or the advice of the Board, and in cases where the dispute is not brought to an end during the deliberations of the tribunal that has been appointed, reliance is placed on the force of public opinion which will be enabled by the publication of the report of the tribunal to arrive at just conclusions on the merits of the dispute

4. The second part of the Bill consists of clause (15) which relates to public utility services. "Public utility services" is defined in clause (2) (*f*), and it will be observed that, in accordance with this definition, clause (15) is only applicable to such railway services as have been notified by the Governor-General in Council. The clause makes it a penal offence for workers employed on monthly wages in public utility services to strike without previous notice, and also provides heavier penalties for persons abetting such an offence. The clause is based on the principle that persons whose work is vital to the welfare of the community generally should not be entitled to enter into a strike before sufficient time has been given to examine the merits of their grievances and to explore the possibilities of arriving at a peaceful settlement. Provisions of a somewhat similar type already exist in the Indian Post Office Act and in a number of Municipal Acts in India, and the principle is one which is widely accepted in other countries.

5. Clauses (16) to (20) contain certain special provisions relating to illegal strikes and lock-outs. These clauses follow closely the provisions of sections 1, 2 and 7 of the British Trade Disputes and Trade Unions Act, 1927. They are applicable only in the case of strikes and lock-outs which satisfy both of two conditions; in the first place, the strike or lock-out must have other objects than the mere furtherance of a trade dispute within the industry to which the strikers or employers belong, and, in the second place, the strike or lock-out must be designed to coerce Government, either directly or by inflicting hardship on the community. If these conditions are satisfied, the strike or lock-out becomes illegal. Persons furthering the strike or lock-out are liable to punishment and are deprived of the protection granted to them by the Indian Trade Unions Act, while persons refusing to take part in it are protected from trade union disabilities to which they might otherwise be subjected."—(*Statement of Objects and Reasons*.)

The following is the Report of the Select Committee on the Bill:—

Clause 1.—We have decided to limit the duration of the Act to five years.

Clause 2.—The slight amendment which we have made in sub-clause (*c*) is intended to bring out more clearly the fact that the definition of "employer" is not intended to be exhaustive

In view of the provision which we have made in clause (4) that all the members of a Court of Inquiry shall be persons unconnected with the

dispute or with any industry affected thereby, we have considered it desirable to give some definition of what we mean by the expression "an independent person," and have inserted a definition accordingly as clause (*d*) of this clause.

Sub-clause (*f*) [*now sub-clause* (*g*)].—We are of opinion that a wide power enabling the Government to declare any industry, business or undertaking to be a public utility service is undesirable as well as unnecessary, and we have therefore omitted it. After considerable discussion in regard to the question of specifying certain other industries or undertakings as public utility services, we have reached the conclusion that clauses (*i*), (*ii*), (*iii*) and (*iv*) of this sub-clause as it stands comprise all the services which it is essential to specify in the first place, and, in view of the fact that the general power which the Bill as introduced conferred upon the Government was only exercisable after three months' notice, we think there should be no difficulty in providing for any necessary additions to the clause by an amendment of the Act should occasion arise.

Sub-clause (*j*) [*now sub-clause* (*k*)].—We have amplified the definition of "workman" on the lines of the similar definition in the Canadian Act, and at the same time made it clear that the expression includes clerical workers; and we have added the Royal Indian Marine Service to the Services which the Bill excludes from its scope.

Clause 3.—We have considered various proposals designed to lay upon the Government a definite obligation to convene a Court of Inquiry or a Board of Conciliation in cases where one of the parties so required. We think, however, that, unless both parties are agreed in desiring a reference, it would be useless to fetter the discretion of the Government as to the time at which the matter is ripe for action under this clause. At the same time, we think that no option should be left to the Government to refuse to appoint a Court or Board where the Government is assured that both parties are agreed as to the necessity of a reference, as well as to the form which it should take.

Clause 4.—As already mentioned, we have provided that in every case a Court of Inquiry, whether it consists of one or of more persons, shall not include persons having an interest in the dispute or in any industry affected by it.

Clause 6.—We have made an amendment to sub-clause (2) to make clear the original intention which was that only persons appointed to a Board to represent the parties should be appointed on the recommendation of the parties; and we have made slight alterations in the proviso to sub-clause (3) in order to bring it into line with the wording of clause (10).

Clauses 7 and 9.—The amendments which we have made to these clauses are of a purely drafting nature.

Clause 10.—In view of the fact that members of Courts and Boards will now invariably be independent persons except in the case where a Board is composed of an independent chairman and an equal number of representatives of each party and that the case of a vacancy in the office of any such representative member is already dealt with in clause (6), clause (10) will now apply to independent members only, and we have amended it accordingly.

Clause 12.—We have amended this clause on the lines of the English Act to make it quite clear that every report of a Court or Board, whether a final or interim report, must be published, and that only the publication of such information or evidence as the appointing authority thinks fit should be left to its discretion.

Clause 14.—We consider it inadvisable to forbid the representation of parties before Courts and Boards by legal practitioners subject only to exceptions As we have redrafted the clause, such representation will ordinarily be permissible, subject however to such conditions and restrictions as may be provided by rules.

Clause 15—We have decided to accept the principle of this clause which however, as originally drafted, was open to certain criticisms. For example, it was pointed out that many persons are actually employed upon a daily wage which is in practice paid monthly; also that the clause would appear to penalise abstention from work on the part of a particular individual; and further that the clause is onesided and inflicts no penalty upon an employer who locks out his workmen. The latter point is, we think, one which must certainly be met and as by the nature of his employment a casual or day to-day labourer must be entitled to cease work at any moment and be similarly liable to dismissal, we agree that he should be excluded altogether from the operation of this clause. We have accordingly adopted a suggestion made by the Bombay Government which makes it clear that the cessation of work must be in the nature of a strike as defined in the Bill, and we have provided that, in order to render it a penal offence, the strike must be in breach of a definite contract between the employer and the workman; we have further made a collateral provision penalising an employer for locking out his workman in breach of any contract.

We have decided to omit sub-clause (2) of the Bill as introduced, which imposed a more severe penalty upon the abettor of an offence under sub-clause (1), as we think such persons can be sufficiently dealt with under the ordinary criminal law of abetment.

As regards sub-clause (3) [now sub-clause (4)], the point was taken that, where the employer is a Government department, the authority whose sanction would be necessary to enable a prosecution to be instituted would be the Government itself A suggestion was accordingly made that where a trade union exists in the affected industry, a special resolution of three-fourths of the members, confirmed by a similar resolution at a later period, should be sufficient warrant for the launching of a prosecution. We cannot, however, accept this as a satisfactory solution of what we feel is only a technical difficulty in view of the fact that many classes of prosecutions of Government servants can only be undertaken with the sanction of Government itself.

Clause 16—We have adopted this clause, but with some amendments which we think will restrict its scope without materially impairing its effectiveness Our attention has been particularly directed to the provisions of clause (*b*) of sub-clause (1), which, as drafted, we consider to be too wide and uncertain in its meaning. It is possible to hold that any strike inflicts a certain degree of hardship upon the community, and it would therefore be possible for a strike which fulfils both the conditions in (*a*) and (*b*) to be brought within this clause, although it was in the nature of a demonstration and lasted for no more than one day. The amendments which we suggest, apart from the omission in clause (*a*) of the words "or in addition to," accordingly make it clear that the strike or lock-out must be designed to cause really severe, general and prolonged hardship to the community for the purpose of compelling Government to take any particular action, whether in connexion with the dispute or otherwise.

In sub-clause (2) we have made it clear that, for the application of money to be illegal it must not merely tend to further or support the strike, but have the direct effect of so doing. This is intended to exclude a case in which money is spent upon the relief of the dependants of strikers.

In sub-clause (3) we have borrowed a provision from the English Act of 1927 further explaining the circumstances in which a group of workmen should be deemed to be within the same trade or industry.

Clause 17.—We have somewhat modified the penalties provided for the instigation of an illegal strike.

Clause 18.—We have decided to omit this, as the provisions of section 17 of the Indian Trade Unions Act, 1926, will not apply in the case of an agreement to commit an offence, and therefore specific exclusion of the case of an illegal strike is not necessary. As regards section 18 of the Indian Trade Unions Act, this section only applies in the case of acts done in furtherance of a trade dispute, and, if a genuine trade dispute forms part of the ground for any illegal strike, we think that no harm will be done by leaving the provisions of section 18 to operate in the case of registered trade unions.

Clause 20.—We think there is no sufficient justification for giving a power to the Government to apply for injunctions restraining the expenditure of the funds of a trade union in connexion with an illegal strike. Under clause 16 such expenditure has been declared to be illegal and the persons properly interested in seeing that the funds are not misspent are the members of the trade union concerned.

Clause 21 (*now clause* 19).—The only alteration which we have made in this clause is consequential upon the amendment made to clause 14.

The following Minutes of Dissent have been appended to the Report.—

"I sign the report subject to the following minute of dissent.

I do not consider that Government should interfere unless the dispute is a major one and until direct negotiations between the parties have failed, and so I see no reason why Government should interfere except at the request of at least one party to the dispute where a registered trade union of the operatives in the trade concerned exists. This would allow Government to intervene where labour was disorganised and without knowledge of its privileges and rights.

The opposition to the above views considers that unless Government has the right of intervention at any time both parties would be likely to pursue obstinately an internecine warfare, suicidal to themselves and detrimental to the public interest It does not appreciate the fact that one or other party would always be desirous of obtaining the support of Public Opinion and would thus hasten to demand Government intervention It is only when both sides feel that they are on the way of coming to a satisfactory settlement that neither would desire the intervention of third party busy bodies

The alteration of the law relating to picketing is one for which in my opinion the time is ripe. Picketing of any kind should be rendered illegal while a Court or Board is sitting, and the law on picketing at any time should be altered to render it illegal at or near a workman's house as under the English law.

There appears to be some doubt as to whether legislation of this kind should take place in this Bill or by an amending Bill to section 503 of the Indian Penal Code. It has been stated that if an amendment of this kind were passed in the Select Committee, it would delay the present Bill. I do not desire to delay the acceptance of the provisions of this Bill and so did not press the point which was raised by other Members of the Select Committee; but I consider that suitable action should be taken by Government whether when this Bill is before the House or by bringing out an amending Bill to the Indian Penal Code to deal with this most important and necessary point."—(*Victor Sassoon*)

With regard to sections 3, 4 and 6, I am of opinion that the appointing authority of the members of Boards of Conciliation and of the Courts

of Inquiry shall be the High Court of Judicature of the place in the jurisdiction of which the dispute has arisen or is apprehended instead of the Local Government or the Governor-General in Council as at present provided in the Bill. As for the constitution of these Boards and Courts these should consist of representatives—one in respect to Courts of Inquiry and two in respect to Boards of Conciliation—of each party to the dispute with a Chairman elected by these representatives. I would therefore amend these sections so as to bring them in conformity to these views and make consequential amendments in sections 8 and 10 and any other sections which may require changes. In view of the alterations I propose, the definition of independent person, *i e*, clause (*d*) of section 2 shall be deleted as unnecessary. I suggest two other alterations, one in section 5 and another in section 12. I would add a clause to section 5 requiring Boards and Courts to report to the appointing authority and obtain its orders before it makes any inquiry in private As to reports made by Courts of Inquiry under section 12 I would make them final and binding on the parties on the confirmation of the same by the appointing authority with such modifications as it thinks fit, after hearing both parties.

I shall now give briefly my reasons for suggesting the changes which I propose It must be remembered that Courts and Boards constituted must inspire perfect confidence in the minds of parties if these are intended to serve the public. In this connection it must be remembered that almost all Governments are considered to have a bias for the interests of Capital rather than of Labour Even in countries, such as Australia, where the Government is Labour, there is this suspicion. The reason stated is that capitalists have vested interests and a stake in the country, whereas labourers have none Whether there is or there is not substance in this, the fact remains that there is this suspicion entertained by Labour against Governments, whether these are employers of Labour or not. The suspicion becomes all the greater in countries like India, where the Government is the largest employer of Labour It is therefore highly desirable that the Government of India should not only be quite just and impartial in such matters, but should take steps to see that it is altogether beyond even a shred of suspicion. The only way to do this is to make the Boards and Courts altogether independent of Government When I say this I remember that often it is said that the appointing authority under the Bill, *viz*, the Government, is not a single person and the part of the Government which is the employer of Labour would have but a distant connection with the part which appointed the Board or the Court and dealt with its conclusions. I do not think this argument is quite sound. For instance, in most matters where Government is an employer, such as Railways, Post and Telegraphs, and the like, the Railway Board and the members of the Executive Council in charge of the particular portfolios cannot be said to have a distant connection with the part of the Government which appointed the Boards and Courts.

With respect to my suggested amendments to sections 5 and 12 my reason for the change proposed in section 5 is that, in my opinion, provisions regarding secrecy of any proceedings in respect to matters of public importance, especially when these matters come up before tribunals, should, as a rule, be done away with and inquiries should be public and open I have, therefore, recognising that in trade disputes, there are likely to be matters which deserve to be kept strictly confidential, placed certain safeguards over inquiries in private lest this power should be abused.

With respect to the Reports of Court of Inquiry dealt with in section 12 of the Bill, these should be made final and binding on parties under certain limitations, *viz*, the consideration by High Courts, I have done this after great hesitation Neither the capitalists nor Labour Associations

nor the Government have thought fit to suggest this. I fear there is something behind this which makes all parties reticent about an expression of view and fight shy of this point of making the report final and binding I am, therefore, not keen on this change, but I have mentioned it for such consideration as it deserves."—(*V V Jogiah*)

"The fundamental objections to the Bill as it emerges from the Select Committee remain unaffected. We feel that clauses 15 and onwards far from settling trade disputes will only multiply them; they will embitter relations between the employer and the employed and will, as all experience of similar legislation testifies, be utilised by the authorities for crushing political propaganda unpleasant to the bureaucracy. If the object of the Bill is to develop and foster genuine trade union movement in the country, clauses 15 and onwards will surely defeat that object For these reasons we recommended in the Select Committee the deletion of the 15th and subsequent clauses But having failed in that object we are obliged to append this minute of dissent Up to clause 14 the Bill is a genuine attempt towards settlement of trade disputes by means of courts of inquiry and boards of conciliation We believe that so far as that portion of the Bill is concerned, it emerges from the Select Committee considerably improved and strengthened Almost all the changes that have been made in the Bill up to that clause have served to make it more equitable and just Of course, we leave out of account the definition of the "public utility services" in clause 2 (*g*). That definition is consequentral on the clause 15 and should therefore be considered along with it. We believe that this clause is a great danger to friendly relations between the employers and the employed A public service may be a "utility service," but it does not therefore follow that a strike in such services without notice ought to be visited with criminal prosecution. It is true that a lock-out in such services has been made an offence also, but that does not affect the argument against making a strike a penal offence. We cannot understand why a strike in a postal, telegraph or telephone service or for the matter of that in any Railway service should be made a crime No doubt such a strike is inconvenient and interferes with our ordinary comforts, but it is monstrous to claim that if any body of men refuse to minister to our comforts and conveniences they ought to be branded as criminals especially when the strikers feel that these comforts and conveniences can only be satisfied by their own degradation and misery. Can it be seriously contended that the Frontier Mail and similar luxurious Railway services are so vital to society that strikes thereon should be made illegal? For the Legislature to give sanction to so iniquitous a doctrine as the one which is embodied in clause 15 is to proclaim to the world that the mass of mankind ought to remain wage slaves and that they would strike only on the pain of being clapped into jail We are most anxious to promote the industrial advancement of our country but not by methods of coercion as proposed under this clause We grant that services like the supply of water, light and sanitation are absolutely essential to the very existence of society and that any strike in such services should be discouraged by all legitimate means, not because they are "public utility services" but because they are "social security services"; and as no man could be permitted to have interest against the very existence of society we are not opposed to any legislation against making strikes in the "social security services" illegal; but such strikes are already illegal and what is more, the punishment provided for them is heavier as will be seen by reading section 43 of the Indian Penal Code along with section 120-A as pointed out by the Hon'ble Mr Justice Wort of the Patna High Court So far as merely "public utility" services are concerned, clause 15 is iniquitous and so far as "social security services" are concerned, this clause is unnecessary, and we therefore are entirely against its inclusion in the Bill As regards clause 16 and subsequent clauses they are out of tune with the

spirit of the earlier portion of the Bill. Even in a country like England where the trade union movement is highly developed similar provisions have met with universal condemnation with the rank and file of the entire body of trade unions there It cannot therefore be claimed that in a country where the trade union movement is still in its infancy such clauses could lead to beneficial results. They can lead only to disaster, while the rigour of the clause 16 (1) (*b*) has been somewhat softened by the changes made therein, the fundamental objections to it remain entirely unaffected. It cannot be suggested that workers should be deprived of the rights of citizenship simply because they are employed in some industry or business. No legislation which directly or indirectly interferes with fundamental human rights can meet with our approval. These clauses first assume that sympathetic strikes even in ordinary business are wrong. They further assume that if employees strike work in order to assist any agitation or propaganda for political rights they deserve to be suppressed, but such an idea, *i.e*, that the least external interference with the normal working of trade and industry should be regarded as criminal cannot be maintained in modern times and we therefore unequivocally oppose all these clauses

One more thing remains to be stated In order to take action against employers in cases of lock-outs it is necessary to get the previous sanction of the Governor-General in Council. This might work well so long as the employer is a non-official. But in case of the Government employers such a provision would remain a dead letter. It is next to impossible to obtain the sanction of the Governor-General in Council if a trade union desires to prosecute any Agent of a Railway or a Member of the Railway Board We had therefore proposed that against official employers registered trade unions sought to be allowed to sanction prosecution, if they decide to launch one, after passing an extraordinary resolution with a three-fourths majority to that effect. We think that the inclusion of such a provision is necessary if workmen are to be given the right to prosecute illegal lock-outs by official employees. We also think that the protection given to blacklegs in clause 17 amounts to an improper interference with the internal administration of Trade Unions, but even if the changes we have pressed are accepted, we cannot support clauses 15 onwards as they are calculated to turn the Bill into the "Employers Charter" and to give legal sanction to a system of forced labour."—(*Jamnadas M Mehta, M S Sesha Aiyangar, S C Mitra, V. V. Jogiah*)

"I do not think that the Trade Disputes Bill can be said to be complete without a clause of picketing inserted in it. Picketing is a harassment for honest and willing workers and its provision should find a legitimate place in this Bill The whole object of this Bill would be destroyed if picketing would be allowed when any trade dispute is under inquiry or investigation by a Court or Board. I am therefore of opinion that picketing should be made illegal.

As regards clause 16, as amended by the Select Committee, it is too wide and vague and will not serve the purpose for which it was intended. Whilst I believe that no political clause should be inserted in this Bill, I am strongly of opinion that no industry should be paralysed for coercing Government regardless of the ruin that it may cause to the community and to the industry"—(*Fazal I Rahimtoola*)

"I do not find myself in a position to support clauses 16, 17 and 18. There is no doubt that the present clauses relating to illegal strikes are an improvement on those in the draft Bill, but my objection on principle remains and I cannot give such provision my support"—(*G D. Birla*)

"The Bill has undergone changes in the Select Committee, some of which are of a substantial character. They make that part of the Bill which deals with the investigation and settlement of trade disputes more acceptable

and meet some of the objections raised against that part which is concerned with strikes in public utility services and general strikes. But the fundamental objections to this part of the Bill remain unaffected by the alterations introduced by the Select Committee.

I take it that the main purpose of the Bill is to enable Government to bring about the settlement of a trade dispute either by persuading the employers and the employees to arrive at an amicable understanding or by bringing the force of public opinion to bear upon the parties concerned The Bill gives no power to Government to enforce the decision of a Board of Conciliation or Court of Inquiry The success of their intervention will thus depend on psychological causes. It is necessary therefore that the Bill should create an atmosphere of sympathy and goodwill Looked at from this point of view, the retention of provisions relating to strikes in public utility services and general strikes must be regarded as a serious mistake. They will sow distrust in the minds of the workers who will regard them as aimed at their class and create suspicion in the mind of the public which will ascribe a political origin to them The hostile feelings which the Bill will create may entirely defeat its principal object.

Clause 15 which deals with strikes in public utility services renders a strike in violation of the terms of service without previous notice illegal If it was attempted to make sudden strikes penal only in services where stoppage of work without adequate notice would endanger human health or life the case for such action would theoretically be clear, however difficult the enforcement of the law might be in practice But the definition of a public utility service in spite of the deletion of that provision by the Select Committee which would have vested Government with a discretionary power to declare any service a public utility service still includes services sudden strikes in which, whatever the inconvenience they may cause, cannot involve danger to life However undesirable sudden strikes may be in any undertaking, there is no ground for making them penal where they do not affect the safety of the community. It may further be pointed out that sudden strikes in services which affect the existence of the community have been made illegal by provincial legislation Proved defects in the existing law can be easily remedied by the provinces. Besides, strikes, if resorted to in breach of contract, can be severely dealt with under the Indian Penal Code It is true that lock-outs in public utility services have been placed on the same level as strikes and rendered punishable, but this does not in any way affect the argument against the retention of clause 15.

Again, if certain services are of exceptional importance to society, the welfare of the workers who carry them on should also be a matter of special concern to us, but the Bill accords them no privileges, and amendments seeking to secure privileges for them were held to be outside the scope of the Bill.

The objections to clause 16, even as amended by the Select Committee, are of a more serious character Legislation undertaken on similar lines in England met with determined opposition from responsible Labour leaders although the trade union movement is highly organised there and the difficulties in interpreting it were commented on by eminent lawyers and jurists. As pointed out in the debate which took place when the Bill was referred to the Select Committee there is a danger that sympathetic strikes and strikes the object of which is to get labour laws suitably changed may be held to be illegal under clause 16. There is also a justifiable fear that the clause may be used for political purposes No evidence has been adduced to show either the urgency or the desirability of such a provision at this stage. It is bound to be regarded in the present circumstances as a direct attack on Labour and should be strenuously opposed.

It has been contended that the clauses referred to above are calculated to lead to a healthy development of the trade union movement and are therefore in the interests of the workers themselves. It is difficult to take such an argument seriously. I am unable to see how these clauses will bring about the extension of the trade union movement or a quicker organisation of Labour.

The second part of the Bill seems to me to have a definitely political tinge about it. It has no necessary connection with the first part. If the Bill is meant to promote peace in the industrial world it should be shorn off the objectionable features briefly discussed above."—(*H. N Kunzru.*)

"I agree with the general principles of the Bill as it emerges from the Select Committee. I suggest that the Act should remain in force till 31st March, 1934, and not for 5 years"—(*M A. Jinnah.*)

[12*th April*, 1929.]

An Act to make provision for the investigation and settlement of trade disputes, and for certain other purposes.

WHEREAS it is expedient to make provision for the investigation and settlement of trade disputes, and for certain other purposes hereinafter appearing; it is hereby enacted as follows:—

Short title, extent, commencement and duration.

1. (1) This Act may be called THE TRADE DISPUTES ACT, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the Governor-General in Council may, by notification in the *Gazette of India*, appoint.

(4) It shall remain in force for a period of five years only.

Interpretations.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Board" means a Board of Conciliation constituted under this Act;

(*b*) "Court" means a Court of Inquiry constituted under this Act;

(*c*) "employer," in the case of any industry, business or undertaking carried on by any department of the Government, means the authority prescribed in this behalf or, where no authority is prescribed, the head of the department;

(*d*) a person shall be deemed to be "independent" for the purpose of his appointment as the chairman or other member of a Court or a Board if he is unconnected with the dispute with reference to which the Court or the Board is appointed and with any trade or industry directly affected by the dispute;

(*e*) "lock-out" means the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him, where

such closing, suspension or refusal occurs in consequence of a dispute and is intended for the purpose of compelling those persons, or of aiding another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment;

(*f*) "prescribed" means prescribed by rules made under this Act;

(*g*) "public utility service" means—

(i) any railway service which the Governor-General in Council may, by notification in the Gazette of India, declare to be a public utility service for the purposes of this Act; or

(ii) any postal, telegraph or telephone service; or

(iii) any industry, business or undertaking which supplies light or water to the public; or

(iv) any system of public conservancy or sanitation;

(*h*) "railway company" means a railway company as defined in section 3 of the Indian Railways Act, 1890;

(*i*) "strike" means a cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment;

(*j*) "trade dispute" means any dispute or difference between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person; and

(*k*) "workman" means any person employed in any trade or industry to do any skilled or unskilled manual or clerical work for hire or reward, but does not include any person employed in the naval, military or air service of the Crown or in the Royal Indian Marine Service.

Reference of Disputes to Courts and Boards.

Reference of disputes to Courts or Boards.

3. If any trade dispute exists or is apprehended between an employer and any of his workmen, the Local Government or, where the employer is the head of a department under the control of the Governor-General in Council or is a railway company, the Governor-General in Council may, by order in writing,—

(*a*) refer any matters appearing to be connected with or relevant to the dispute to a Court of Inquiry to be appointed by the Local Government or the Governor-General in Council, as the case may be; or

(*b*) refer the dispute to a Board of Conciliation to be appointed by the Local Government or the Governor-General in Council, as the case may be, for promoting a settlement thereof:

Provided that, where both parties to the dispute apply, whether separately or conjointly, for a reference to a Court, or where both parties apply, whether separately or conjointly, for a reference to a Board, and the authority having the power to appoint is satisfied that the persons applying represent the majority of each party, a Court or a Board, as the case may be, shall be appointed accordingly.

Courts of Inquiry.

4. (1) A Court shall consist of an independent chairman and such other independent persons as the appointing authority thinks fit, or may, if such authority thinks fit, consist of one independent person. Constitution of Courts.

(2) A Court, having the prescribed quorum, may act notwithstanding any vacancy in the number of its members other than the chairman.

5. (1) A Court shall, either in public or in private, at its discretion, inquire into the matters referred to it and report thereon to the authority by which the Court was appointed. Duties of Courts.

(2) A Court may, if it thinks fit, make interim reports.

Boards of Conciliation.

6. (1) A Board shall consist of a chairman and two or four other members, as the appointing authority thinks fit, or may, if such authority thinks fit, consist of one independent person. Constitution of Boards.

(2) Where the Board consists of more than one person, the chairman shall be an independent person and the other members shall be either independent persons or persons appointed in equal numbers to represent the parties to the dispute; all persons appointed to represent any party shall be appointed on the recommendation of that party:

Provided that, if any party fails to make the necessary recommendation within the prescribed time, the appointing authority shall select and appoint such persons as it thinks fit to represent that party.

(3) A Board, having the prescribed quorum, may act notwithstanding any vacancy in the number of its members other than the chairman:

Provided that, where a Board includes an equal number of persons representing the parties to the dispute and the services of any such person cease to be available before the Board has completed its work, the authority appointing the Board shall appoint, in the manner specified in sub-section (2), another person to take his place, and the proceedings shall be continued before the Board so reconstituted.

7. (1) Where a dispute has been referred to a Board under this Act, it shall be the duty of the Board to endeavour to bring about a settlement of the same, and for this purpose the Board Duties of Boards.

shall, in such manner as it thinks fit and without delay, investigate the dispute and all matters affecting the merits thereof and the right settlement thereof, and in so doing may do all such things as it thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute, and may adjourn the proceedings for any period sufficient in its opinion to allow the parties to agree upon terms of settlement.

(2) If a settlement of a dispute is arrived at by the parties thereto after it has been referred to a Board and during the course of the investigation thereof, a memorandum of the settlement shall be drawn up by the Board and signed by the parties, and the Board shall send a report of the settlement, together with the memorandum, to the authority by which the Board was appointed.

(3) If no such settlement is arrived at during the course of the investigation, the Board shall, as soon as possible after the close thereof, send a full report regarding the dispute to the authority by which the Board was appointed, setting forth the proceedings and steps taken by the Board for the purpose of ascertaining the facts and circumstances relating to the dispute and of bringing about a settlement thereof, together with a full statement of such facts and circumstances and its findings thereon and the recommendation of the Board for the determination of the dispute.

(4) The recommendation of the Board shall deal with each item of the dispute, and shall state in plain language what in the opinion of the Board ought and ought not to be done by the respective parties concerned.

General.

Finality of orders constituting a Court or Board.

8. No order of the Governor-General in Council or of a Local Government appointing any person as a member of a Court or a Board shall be called in question in any manner.

Procedure and powers.

9. (1) Courts and Boards shall, subject to the provisions of this Act, follow such procedure as may be prescribed.

(2) Courts and Boards shall have the same powers as are vested in Courts under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:—

(*a*) enforcing the attendance of any person and examining him on oath;

(*b*) compelling the production of documents and material objects; and

(*c*) issuing commissions for the examination of witnesses; and shall have such further powers as may be prescribed, and every inquiry or investigation by a Court or Board shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.

Filling of vacancies.

10. (1) If the services of the chairman or of any other independent member of a Court or Board cease to be available at any time for the purposes of the Court or Board, the appointing authority shall in the case of a chairman, and may in the case of any other member, appoint another independent person to fill the vacancy, and the proceedings shall be continued before the Court or Board so reconstituted.

(2) Where the Court or Board consists of one person only and his services cease to be available as aforesaid, the appointing authority shall appoint another independent person in his place, and the proceedings shall be continued before the person so appointed.

Form of report.

11. The report of a Court or Board shall be in writing and shall be signed by all the members of the Court or Board:

Provided that nothing in this section shall be deemed to prevent any member of a Court or Board from recording a minute of dissent from a report or from any recommendation made therein.

Publication of results of inquiry.

12. (1) The final and any interim report of a Court or Board, together with any minute of dissent recorded therewith, shall, as soon as possible after its receipt by the authority by which the Court or Board was appointed, be published by that authority in such manner as it thinks fit.

(2) The said authority may publish or cause to be published from time to time, in such manner as such authority thinks fit, any information obtained, or conclusions arrived at, by the Court or Board as the result or in the course of its inquiry or investigation.

Certain matters to be kept confidential.

13. (1) Notwithstanding anything contained in S. 12, there shall not be included in any report or publication made or authorised by a Court or Board or the authority appointing a Court or Board any information obtained by the Court or Board in the course of its inquiry or investigation as to any Trade Union or as to any individual business (whether carried on by a person, firm or company) which is not available otherwise than through evidence given before the Court or Board, except with the consent in writing of the Secretary of the Trade Union or of the person, firm or company in question; nor shall any individual member of the Court or Board or any person concerned in the proceedings before it disclose any such information without such consent.

(2) If any member of a Court or Board or any person present at or concerned in the proceedings before a Court or Board discloses any information in contravention of the provisions of sub-section (1), he shall, on complaint made by or under the authority of the Trade Union or individual business affected, be punishable with fine which may extend to one thousand rupees:

Provided that nothing in this sub-section shall apply to the disclosure of any such information for the purposes of a prosecution under section 193 of the Indian Penal Code.

Representation of parties.

14. Subject to such conditions and restrictions as may be prescribed, any party to a dispute under inquiry or investigation by a Court or Board shall be entitled to be represented before the Court or Board by a legal practitioner.

Special provision regarding Public Utility Services.

Sudden strikes and lock-outs in utility services.

15. (1) Any person who, being employed in a public utility service, goes on strike in breach of contract without having given to his employer, within one month before so striking, not less than fourteen days' previous notice in writing of his intention to go on strike or, having given such notice, goes on strike before the expiry thereof, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to fifty rupees, or with both.

(2) Any employer carrying on any public utility service who locks out his workmen in breach of contract without having given them, within one month before such lock-out, not less than fourteen days' notice in writing of his intention to lock them out, or, having given such notice, locks them out before the expiry thereof, shall be liable to imprisonment which may extend to one month, or to a fine which may extend to one thousand rupees, or with both.

(3) Where the employer committing an offence under sub-section (2) is a corporation, company or other association of persons, any secretary, director or other officer or person concerned with the management thereof shall be punishable as therein provided unless he proves that the offence was committed without his knowledge or without his consent.

(4) No Court shall take cognisance of any offence under this section or of the abetment of any such offence save on complaint made by, or under authority from, the Governor-General in Council or the Local Government.

(5) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this section.

Special provision for Illegal Strikes and Lock-outs.

Illegal strikes and lock-outs.

16. (1) A strike or a lock-out shall be illegal which—

(*a*) has any object other than the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged; and

(*b*) is designed or calculated to inflict severe, general and prolonged hardship upon the community and thereby to compel the Government to take or abstain from taking any particular course of action.

(2) It shall be illegal to commence or continue, or to apply any sums in direct furtherance or support of any such illegal strike or lock-out.

(3) For the purposes of this section—

(*a*) a trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of persons in that trade or industry;

(*b*) without prejudice to the generality of the expression "trade or industry," workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with agreements made with the same employer or group of employers.

(4) A strike or a lock-out shall not be deemed to be calculated to compel the Government unless such compulsion might reasonably be expected as a consequence thereof.

Penalty.

17. (1) If any person declares, instigates, incites others to take part in, or otherwise acts in furtherance of, a strike or lock-out which is illegal under the provisions of section 16, he shall be punishable with simple imprisonment which may extend to three months, or with fine which may extend to two hundred rupees, or with both:

Provided that no person shall be deemed to have committed an offence under this section by reason only of his having ceased work or refused to continue to work or to accept employment.

(2) No Court shall take cognisance of any offence under this section save on complaint made by or under authority from the Governor-General in Council or the Local Government.

(3) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this section.

Protection of persons withholding from illegal strike or lock-out.

18. (1) No person refusing to take part, or to continue to take part, in any strike or lock-out which is illegal under the provisions of section 16 shall, by reason of such refusal or by reason of any action taken by him under this section, be subject to expulsion from any trade union or society, or to any fine or penalty, or to deprivation of any right or benefit to which he or his legal representatives would otherwise be entitled, or be liable to be placed in any respect, either directly or indirectly, under any disability or at any disadvantage as compared with other members of the union or society, anything to the contrary in the rules of a trade union or society notwithstanding.

(2) Nothing in the rules of a trade union or society requiring the settlement of disputes in any manner shall apply to any proceeding for enforcing any right or exemption secured by this section, and in any such proceeding the Civil Court may, in lieu of ordering a person who has been expelled from membership of a

trade union or society to be restored to membership, order that he be paid out of the funds of the trade union or society such sum by way of compensation or damages as that Court thinks just.

Rules.

Power to make rules.

19. (1) The Governor-General in Council in respect of industries, businesses and undertakings carried on by him or under his authority, or by a railway company, and the Local Governments in respect of other businesses, industries, or undertakings within their respective provinces, may make rules for the purpose of giving effect to the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the powers and procedure of Courts and Boards, including rules as to the summoning of witnesses, the production of documents relevant to the subject-matter of an inquiry or investigation and the number of members necessary to form a quorum;

(*b*) the allowances admissible to members of Courts and Boards and to witnesses;

(*c*) the ministerial establishment which may be allotted to a Court or Board and the salaries and allowances payable to members of such establishments;

(*d*) the conditions and restrictions subject to which persons may be represented by legal practitioners in proceedings under this Act before a Court or Board;

(*e*) any other matter which is to be or may be prescribed.

(3) All rules made under this section shall be published in the Gazette of India or the local official gazette, as the case may be, and shall, on such publication, have effect as if enacted in this Act.

THE INDIAN SOFT COKE CESS ACT, 1929.

ACT No. VIII OF 1929.

PREFATORY NOTE—"Indian Collieries have for some years past suffered from trade depression, particularly those producing the quality of coal generally known as second class The owners of such collieries have found some relief in the manufacture and sale of soft coke, suitable for domestic consumption, but the market for soft coke is limited, partly owing to the competition of other fuels, and partly because the value of soft coke as a domestic fuel is not generally realised. In these circumstances the Indian Mining Federation approached the Government of India with the suggestion that a cess should be collected by official agents from the trade, and that the proceeds of the cess be devoted to expenditure on measures to popularise

soft coke in Indian markets. It, therefore, considered desirable to impose by legislation a cess of two annas per ton on all soft coke despatched by rail from collieries in Bengal and Bihar and Orissa for the purpose of creating a fund to finance measures for promoting the sale and improving the methods of manufacture of soft coke. It is proposed to entrust the administration of the fund to a Soft Coke Cess Committee, consisting of members representing the two Local Governments concerned, the Indian Mining Federation and the Indian Mining Association, and including the Chief Mining Engineer to the Railway Board, who will also be *ex officio* President of the Committee. This Act which is largely based on the Tea Cess Act and the Lac Cess Act, is intended to give effect to this proposal. It has the support of the Indian Mining Federation which represents the interests of the soft coke industry."—(*Statement of Objects and Reasons*.)

An Act to provide for the levy of a cess on soft coke despatched by rail from collieries in the provinces of Bengal and Bihar and Orissa.

WHEREAS it is expedient to provide for the creation of a fund to be expended by a Committee specially constituted in this behalf for the promotion of the interests of the soft coke industry in the provinces of Bengal and Bihar and Orissa;

AND WHEREAS for this purpose it is expedient to levy a cess on soft coke despatched by rail from collieries in the said provinces;

It is hereby enacted as follows:—

1. (1) This Act may be called THE INDIAN SOFT COKE CESS ACT, 1929. Short title, extent and commencement.

(2) It extends to the whole of British India, except Aden.

(3) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

2. In this Act, unless there is anything repugnant in the subject or context,— Definitions.

(*a*) "Committee" means the Soft Coke Cess Committee constituted under section 4;

(*b*) "prescribed" means prescribed by rules made under this Act; and

(*c*) "soft coke" means all coke which is unsuitable for metallurgical purposes.

3. (1) There shall be levied and collected on all soft coke despatched by rail from collieries in the provinces of Bengal and Bihar and Orissa a cess at the rate of two annas per ton. Imposition of soft coke cess.

(2) The cess shall be collected by the Railway Administrations concerned by means of a surcharge on freight and shall be paid to the Committee, after deduction of the expenses of collection (if any), in such manner as may be prescribed.

Constitution of Soft Coke Cess Committee.

4. (1) The Governor-General in Council shall constitute a Committee, consisting of the following members, to receive and expend the proceeds of the cess:—

(*i*) the Chief Mining Engineer to the Railway Board, *ex-officio*;

(*ii*) one person nominated by the Local Government of Bengal;

(*iii*) one person nominated by the Local Government of Bihar and Orissa;

(*iv*) seven persons nominated by the Indian Mining Federation; and

(*v*) one person nominated by the Indian Mining Association:

Provided that, if within the period prescribed in this behalf, any authority or body fails to make any nomination which it is entitled to make under this section, the Governor-General in Council may himself nominate a member to fill the vacancy.

(2) The Chief Mining Engineer to the Railway Board shall be *ex-officio* President of the Committee.

(3) Where a nominated member dies, resigns, ceases to reside in British India or becomes incapable of acting, the Governor-General in Council may, on the recommendation of the authority or body which would have been entitled to make the nomination if it had been a first nomination under sub-section (1), or where such recommendation is not made within the prescribed period, then on his own initiative, nominate a person to fill the vacancy.

(4) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Committee.

Application of proceeds of soft coke cess.

5. The proceeds of the cess and any other monies received by the Committee shall be applied to meeting the expenses of the Committee and the cost of such measures as it may consider advisable to take for promoting the sale and improving the methods of manufacture of soft coke.

Keeping and auditing of accounts.

6. (1) The Committee shall keep accounts of all monies received and expended under section 5.

(2) Such accounts shall be examined and audited annually by auditors appointed in this behalf by the Governor-General in Council; and such auditors may disallow any item which has, in their opinion, been expended out of any monies so received otherwise than as directed by or under this Act.

(3) If any item is disallowed, an appeal shall lie to the Governor-General in Council, whose decision shall be final.

7. (1) The Governor-General in Council may, after consulting the Committee and after previous publication, make rules to carry out the purposes of this Act. Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the regulation of the nomination of members of the Committee, and the procedure of the Committee,

(b) the regulation of the levy, collection and payment of the cess, and

(c) the form of accounts to be kept and the publication of an abstract of such accounts with the report of the auditors thereon.

(3) All such rules shall be published in the Gazette of India.

8. Sections 2 to 7 shall remain in force only until the 31st December, 1934: Time during which sections 2 to 7 are to remain in force.

Provided that the Governor-General in Council may, on the recommendation of the Committee, declare by notification in the Gazette of India, that the said sections shall continue in force for any further period specified in such notification.

9. When sections 2 to 7 cease to be in force, all monies and other property in the possession of the Committee shall revert to His Majesty. Disposal of surplus proceeds.

THE INDIAN BOILERS (AMENDMENT) ACT, 1929.

ACT No. IX OF 1929.

PREFATORY NOTE.—The necessity for the passing of this Act has been explained as follows in the Statement of Objects and Reasons:—

"The definition of 'boiler' in clause (b) of section 2 of the Indian Boilers Act, 1923, is defective, as it excludes vessels used for generating steam under pressure for use *inside* such vessels. Such vessels are as much liable as other vessels to explode if improperly constructed, used or maintained and may be a source of considerable danger. It has therefore been decided to omit the words 'for use outside such vessel' from the clause

2 Clause (2) of Regulation 3 of the Indian Boiler Regulations, 1924, prohibits the registration and consequently the use of a boiler if a structural part subject to pressure is made of cast-iron. Cast-iron boilers are, however, extensively used in Europe and in America, and it has been pointed out that the restriction imposed by the law in India on the use of cast-iron boilers is a serious impediment to the economic heating of buildings and the supply of hot water. It has therefore been decided that a new clause should be added to section 34 of the Indian Boilers Act, 1923, so as to empower Local Governments to exempt from the operation of the Act, subject to such conditions and restrictions as they may think fit

to impose, any boilers or classes or types of boilers which are used exclusively for the heating of buildings or for the supply of hot water."—(*Statement of Objects and Reasons*)

[*1st October*, 1929.]

An Act further to amend the Indian Boilers Act, 1923, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Boilers Act, 1923, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title. 1. This Act may be called THE INDIAN BOILERS (AMENDMENT) ACT, 1929.

Amendment of section 2, Act V of 1923. 2. In clause (*b*) of section 2 of the Indian Boilers Act, 1923 (hereinafter referred to as the said Act), the words "for use outside such vessel" shall be omitted.

Amendment of section 34, Act V of 1923. 3. Section 34 of the said Act shall be re-numbered as sub-section (2) of section 34, and the following sub-section shall be inserted as sub-section (1) of that section, namely:—

Exemptions. "34. (1) The Local Government may, by notification in the local official Gazette, exempt from the operation of this Act, subject to such conditions and restrictions as it thinks fit, any boilers or classes or types of boilers used exclusively for the heating of buildings or the supply of hot water."

THE INDIAN CENSUS ACT, 1929.

ACT No. X OF 1929.

PREFATORY NOTE.—"The object of this Act is to provide for the taking of a census in 1931. It reproduces, with the necessary verbal alterations, the provision of the Indian Census Act, 1920 (IV of 1920)."—(*Statement of Objects and Reasons*)

[*1st October*, 1929.]

An Act to provide for certain matters in connection with the taking of the Census.

WHEREAS it has been determined to take a census of British India during the year 1931, and it is expedient to provide for certain matters in connection with the taking of such census; it is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN CENSUS ACT, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Appointment of census-officers.

2. (1) The Local Government may appoint any person to take, or aid in, or supervise the taking of, the census within any specified local area.

(2) Persons so appointed shall be called census-officers.

(3) The Local Government may delegate to such authority, as it thinks fit, the power of appointing census-officers which is conferred by this section.

Proof of appointment of census-officers and their status as public servants.

3. (1) A declaration in writing, signed by any officer authorised by the Local Government in this behalf, that any person has been duly appointed a census-officer for any local area shall be conclusive proof of such appointment.

(2) All census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

Discharge of duties of census-officers in certain cases.

4. (1) (*a*) Every officer in command of any body of men belonging to His Majesty's naval, military or air forces or to His Majesty's Indian Marine Service or of any vessel of war,

(*b*) every person (except a pilot or harbour-master having charge or control of a vessel,

(*c*) every person in charge of a lunatic asylum, hospital, workhouse, prison, reformatory or lock-up or any public, charitable, religious or educational institution,

(*d*) every keeper, secretary or manager of any *sarai*, hotel, boarding-house, lodging-house, emigration depot or club, and

(*e*) every occupant of immoveable property who has at the time of the taking of the census not less than twenty persons living on or in such property, and every manager or officer of a railway or other commercial or industrial establishment who has at such time not less than ten persons employed under him,

shall, if so required by the District Magistrate or by such officer as the Local Government may appoint in this behalf, perform such of the duties of a census-officer in relation to the persons who at the time of the taking of the census are under his command or charge, or are inmates of his house or present on or in such immoveable property or are employed under him, as such Magistrate or officer may, by written order, direct.

(2) All the provisions of this Act relating to census-officers shall apply, so far as they can be made applicable, to all persons while performing such duties under this section, and any person refusing or neglecting to perform any duty which he is directed under this section to perform shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

Power of District Magistrate to call upon certain persons to give assistance.

5. (1) The District Magistrate, or such officer as the Local Government may appoint in this behalf for any local area, may, by written order, which shall have effect throughout the limits of his district or of such local area, as the case may be, call upon—

(*a*) all owners and occupiers of land, tenure-holders, farmers, assignees of land-revenue and lessees of fisheries under the Burma Fisheries Act, 1905, or the Upper Burma Land and Revenue Regulation, 1889, or their agents,

(*b*) all village-officers and servants in estates as defined in the Madras Proprietary Estates' Village Service Act, 1894, and

(*c*) all members of panchayats appointed under the Village Chaukidari Act, 1870, or the Sylhet and Cachar Rural Police Regulation, 1883, or members of union boards established under the Bengal Village Self-Government Act, 1919, all ghatwals, Unit-tahsildars and members of a panchayat appointed under the Bihar and Orissa Village Administration Act, 1922, all members of village authorities constituted under the Assam Local Self-Government Act, 1915, or the Assam Rural Self-Government Act, 1926, and all village-headmen in the Kumaun Division of the United Provinces, to give such assistance as he needs towards the taking of a census of the persons who are at the time of the taking of the census on the lands of such owners, occupiers, holders, farmers and assignees, or within the limits of such fisheries or in the villages or other areas for which such village-officers and servants, panchayats, union boards, village-authorities, ghatwals, Unit-tahsildars or village-headmen are appointed, as the case may be.

(2) Such order shall specify the nature of the assistance required, and such owners, occupiers, holders, farmers, assignees and lessees, or their agents, and such village-officers and servants, the members of such panchayats, union boards and village-authorities, and such ghatwals, Unit-tahsildars and village-headmen shall be bound to obey it.

Asking of questions by census-officer.

6. Every census-officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the Local Government and published in the official Gazette, he may be directed to ask.

Obligation to answer questions.

7. Every person of whom any question is asked under the last foregoing section shall be legally bound to answer such question to the best of his knowledge or belief:

Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention.

Occupier to allow access, and permit affixing of numbers.

8. Every person occupying any house, enclosure, vessel or other place shall allow census-officers such access thereto as they may require for the purposes of the census, and as, having regard to the customs of the country, may be reasonable, and shall allow them to paint on or affix to the place such letters, marks or numbers as may be necessary for the purpose of the census.

Occupier or manager to fill up schedule.

9. (1) Subject to such orders as the Local Government may issue in this behalf, any census-officer may leave, or cause to be left,

(a) at any dwelling-house within the local area for which he is appointed, or

(b) with any manager or officer of any commercial or industrial establishment who has at the time of the taking of the census not less than ten persons employed under him,

a schedule for the purpose of its being filled up by the occupier of such house or of any specified part thereof, or by such manager or officer with such particulars as the Local Government may direct regarding the inmates of such house or part, or the person employed under such manager or officer at the time of the taking of the census, as the case may be.

(2) When any such schedule has been so left, the occupier of the house or part to which it relates, or the manager or officer with whom it is left, shall fill it up, or cause it to be filled up, to the best of his knowledge or belief, so far as regards the inmates of such house or part, or the persons employed under him at the time aforesaid, as the case may be, and shall sign his name thereto, and, when so required, shall deliver the schedule so filled up and signed to the census-officer or to such person as the census-officer may direct.

Penalties.

10. In any of the following cases, namely:—

(a) if a census-officer or a person lawfully required to give assistance towards the taking of a census refuses or neglects to use reasonable diligence in performing any duty imposed upon him or in obeying any order issued to him in accordance with this Act or with any rule duly made thereunder,

(b) if a census-officer intentionally puts any offensive or improper question or knowingly makes any false return, or, without the previous sanction of the Governor-General in Council or the Local Government, discloses any information which he has received by means of or for the purposes of a census return,

(c) if any person refuses to answer to the best of his knowledge or belief any question asked of him by a census-officer which he is legally bound by section 7 so to answer,

(d) if any person occupying any house, enclosure, vessel or other place refuses to allow a census-officer such reasonable access thereto as he is required by section 8 to allow,

(e) if any person removes, obliterates, alters or injures before the 31st day of March, 1931, any letters, marks or numbers which have been painted or affixed for the purposes of the census,

(f) if any occupier of a dwelling-house or part thereof or any person with whom a schedule is left under section 9 know-

ingly and without sufficient cause fails to comply with the provisions of section 9, or makes any false return under that section,

he shall be punishable with fine which may extend to fifty rupees.

Jurisdiction in prosecutions.

11. (1) The Government may, by notification in the official Gazette, declare before what classes of Magistrates prosecutions under this Act may be instituted.

(2) Unless and until a notification is published under sub-section (1), all prosecutions under this Act shall, in the towns of Calcuttta, Madras and Bombay, be instituted before a Presidency Magistrate, and elsewhere, before the District Magistrate.

(3) No prosecution under this Act shall be instituted except with the previous sanction of the Local Government, or of some officer authorised by the Local Government in this behalf.

Records of census not open to inspection or admissible in evidence in certain proceedings.

12. No person shall have a right to inspect any book, register or record made by a census-officer in the discharge of his duty as such officer or any schedule delivered under section 9, and notwithstanding anything to the contrary in the Indian Evidence Act, 1872, no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding or any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898.

Temporary suspension of local enactments and rules as to mode of taking census in municipalities.

13. Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority may, at the time appointed for the taking of the census of British India during the year 1931, cause the census of the municipality to be taken wholly or in part by any method authorised by this Act.

Power in regard to expenses.

14. Notwithstanding anything in any enactment or rule, in regard to municipal, local, union or village funds, the Local Government may direct that the whole or any part of any expenses incurred for anything done in accordance with this Act may be charged to any municipal, local, union or village fund constituted for, and on behalf of, the area within which such expenses were incurred.

Power to make rules

15. (1) The Governor-General in Council may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Governor-General in Council may make rules providing—

(*a*) for the appointment of census-officers and of persons to perform any of the duties of census-officers or to give assistance towards the taking of a census, and for the general instructions to be issued to such officers or persons;

(*b*) for the enumerating of persons employed on railways and their families and of other classes of the population for whom it may be necessary or expedient to make special provision; and

(*c*) for the enumeration of persons travelling on the night when a census is taken.

(3) The Governor-General in Council may, by general or special order, direct that all or any of the powers conferred upon him by this section may also be exercised by any Local Government with respect to the territories administered by it.

THE BENGAL PILOT SERVICE (CENTRALISATION OF ADMINISTRATION) ACT, 1929.

ACT No. XI OF 1929.

[*1st October*, 1929.]

An Act further to amend the Calcutta Pilots Act, 1859, *and the Indian Ports Act,* 1908, *in order to vest the control of the Bengal Pilot Service in the Governor-General in Council.*

WHEREAS it is expedient further to amend the Calcutta Pilots Act, 1859, and the Indian Ports Act, 1908, in order to vest the control of the Bengal Pilot Service in the Governor-General in Council; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE BENGAL PILOT SERVICE (CENTRALISATION OF ADMINISTRATION) ACT, 1929.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Amendment of Act XII of 1859.

2. (1) In sections 2, 3, 4, 17, 18, 19 and 20 of the Calcutta Pilots Act, 1859, for the words "Lieutenant-Governor of Bengal" or the words "said Lieutenant-Governor", as the case may be, wherever they occur, the words "Governor-General in Council" shall be substituted.

(2) In section 9 of the said Act, for the words "Magistrate of Police" the words "Presidency Magistrate" shall be substituted.

(3) In sub-section (1) of section 15 of the said Act, for the words "Local Government" the words "Governor-General in Council" shall be substituted.

Amendment of section 35, Act XV of 1908.

3. To sub-section (1) of section 35 of the Indian Ports Act, 1908, the following proviso shall be added, namely:—

"Provided that the rates of fees for pilotage within the Port of Calcutta shall be fixed by the Governor-General in Council."

Saving of things done under Act XII of 1859 and Act XV of 1908.

4. Where anything done under the Calcutta Pilots Act, 1859, or the Indian Ports Act, 1908, is in force immediately prior to the commencement of this Act, it shall be deemed, as from the commencement of this Act, to have been done under the said Acts as hereby amended.

THE INDIAN INCOME-TAX (PROVIDENT FUNDS RELIEF) ACT, 1929.

ACT No. XII OF 1929.

PREFATORY NOTE.—The necessity for the passing of this Act is thus explained in the Statement of Objects and Reasons:—

"The object of this Bill is to give as far as possible the same relief in respect of income-tax to contributions made to private provident funds maintained by commercial and other employers as is now given in respect of life insurance premia. This concession is proposed to be given in order to encourage thrift.

2 Broadly speaking, the form that the concession will take is that of exemption from income-tax of contributions made both by the employer and by the employee in so far as these contributions do not exceed one-sixth of the employee's salary It is to be noted that it is not intended to double the total relief which can be claimed by any individual, and if a subscriber to a provident fund is also paying an annual life insurance premium, he will only be entitled to claim income-tax relief in respect of the latter to the extent that the joint contributions to the provident fund fall short of one-sixth of his total income. The concession will be restricted to provident funds which are subject to irrevocable trusts and otherwise conform to the conditions laid down in this Bill.

3 The following notes explain shortly the provisions in the various clauses:—

Clause 1.—The Act will be brought into force as soon as the necessary rules have been framed. The rules will be issued in advance of the coming into force of the Act under section 22 of the General Clauses Act, 1897.

Clause 2.—This exempts the income from investments of recognised provident funds.

Clause 6.—In view of the many detailed provisions that are necessary, it is considered advisable to have a separate Chapter to cover these provident funds.

Section 58-*A*.—The definitions in this section do not call for any remarks, except sub-section (*b*), which, it will be seen, excludes provident funds maintained by individuals for the benefit of their employees.

Section 58-*B*.—The power of recognition of a Fund and of withdrawal of recognition will vest in the Commissioner of Income-tax At the same time, powers are reserved to the Governor-General in Council to refuse recognition or withdraw recognition even in cases satisfying the requirements of this Chapter These powers, which, it is hoped, will be sparingly used, are intended as a safeguard against abuse

Section 58-*C* sets out the conditions which must be satisfied by a fund before it can be recognised.

Section 58-*D* gives power in certain circumstances to the Commissioner of Income-tax to relax in respect of any particular fund two of the conditions laid down in section 58-C.

Section 58-*E*.—This section sets out the accounts to be maintained by the trustees of the fund and also indirectly, by settling the nomenclature, lays down the extent of exemption both in respect of contributions and in respect of interest.

Sections 58-*F* and 58-*G and clauses* 3 *and* 4.—These are the important substantive sections. The contributions made by the employee will be included in his total income but will be exempt from tax (*see also* clause 4). The annual increment for each year will be disregarded in assessing the employee from year to year. But, at the same time, the employee can claim rebate of tax on insurance premia paid by him under section 15, subject to the condition that the insurance premia paid together with the contributions made by him to the provident fund and the contributions made by the employer do not exceed one-sixth of his total income in the year concerned (*see* clause 3). When the accumulated balance is paid, all sums will be taxed, as part of the total income of that year, which are made up of (*a*) excess contributions, *i.e.*, contributions in excess of one-sixth of salary from year to year, or (*b*) excess interest, *i.e.*, interest above a maximum rate on the one-sixth of salary which is exempt and all interest on excess contributions. The accumulated balance will not be exempt in the case of an employee with less than five years' continuous service under the employer, unless the employee's service is terminated for reasons beyond his control.

Section 58-*H and clause* 5.—These provide for the necessary machinery for collection of tax at source when accumulated balances are paid out by trustees, or other authorised persons.

Section 58-*I*.—This relates to the settlement of transitional problems arising out of the recognition of funds already in existence and leaves details to be settled by rules.

Section 58-*J*.—This provides that the deduction from the employer's taxable profits of sums initially transferred by him to the trustees of his employees' provident fund shall, on the recognition of such fund, be spread over a number of years.

Section 58-*K*.—This gives further rule-making powers to the Governor-General in Council in addition to powers conferred in various provisions of the Chapter. It should be observed that rule-making powers in regard to substantive questions will vest in the Governor-General in Council, while rule-making powers in regard to matters of machinery, procedure and administration will vest in the Central Board of Revenue.

Section 58-*L*.—This makes it clear that funds to which the Provident Funds Act of 1925 applies will not be affected."—(See *Statement of Objects and Reasons*.)

The following is the Report of the Select Committee on the Bill:—

"The Bill, as introduced, was drafted on the principle that all excess contributions and interest above the limit which is to be exempt from the payment of tax should be accumulated year by year and taxed as a lump sum at the end of the employee's service. We consider that, even to the limited extent of the excess contributions, this principle would be inconvenient in practice and would be inequitable in those cases where the receipt of large lump sum might render an employee, otherwise exempt, liable to pay income-tax, or raise his rate of income-tax, or even render him liable to super-tax. We prefer a system whereby the annual accretion to an employee's individual account shall be deemed to be income received by

him and, subject to the exemption granted, taxed each year at the rate applicable. This principle, we consider, will be simpler to work in practice and it will have the desirable effect of allowing the whole of the employee's provident fund to be paid over to him at the end of his service without delay or diminution.

This change of accounting and taxation method, while not varying the substance of the Bill, or interfering with the extent of the exemptions granted, has involved substantial textual amendments. We have had to recast the whole of clauses 58-E, 58-F, 58-G, 58-H and 58-I, and have replaced them by six new clauses 58-E to 58-J; but in doing so we have adhered strictly to the general principles underlying the Bill as introduced. We need only make special mention of clause 58-I dealing with the transfer of existing funds to funds which are newly recognised. We have cast the duty on employers of making up final accounts of existing funds, and of showing in them the portion of each employee's balance which is to be transferred to the recognised fund. Subject to the reservation that no tax already paid on an employee's own contribution will be refunded, the portion so transferred will receive retrospectively exemption from tax up to the same limit as will be given to the employee's future account. As regards any excess over and above the exempted portion which may be transferred, in order to avoid inconvenience in individual cases arising from the payment of a large amount of income-tax on such a lump sum, we have provided that an employee may withdraw the amount of the excess tax payable by him for that year from his balance in the recognised provident fund.

In addition, we have made several drafting amendments, minor amendments of substance, and consequential amendments.

The amendments in clause 3 and in old clause 5, now clause 4, and the omission of old clause 4 are consequential on our re-drafts of clauses 58-E to 58-I.

Clause 58-A.—We have altered the definition of "employer" so as to include bodies such as Chambers of Commerce which are associations of associations and not associations of individuals; and also in order to include individuals engaged in a business, profession or vocation.

We have altered the definition of "employee" so as to exclude personal and domestic servants.

Clause 58-B.—We have added a new sub-clause providing for an appeal against an order of the Commissioner refusing to recognise a provident fund.

Clause 58-C, sub-clause (1) :—

Condition (*e*).—We consider it to be in the interest of the employees to require that the fund shall be vested in two or more trustees.

Condition (*g*).—The category of heirs and executors in this condition is incomplete, and it would involve some risk to attempt to draft a complete category. We have, therefore, omitted the category entirely in order that the clause may cover all cases of lawful payees

Clause 58-L—old clause 58-K.—In clause (*b*) of sub-clause (2), we have deleted the word "private" before the word "company", as in our opinion there may be cases of shareholders in public companies just as well as in private companies who should properly come within the scope of the clause. We have been assured that it is the intention of Government that the rules to be framed under this provision will apply only to employees who are shareholders holding a substantial portion of the shares of a company.

[1*st October*, 1929.]

An Act further to amend the Indian Income-tax Act, 1922, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN INCOME-TAX (PROVIDENT FUNDS RELIEF) ACT, 1929.

(2) It shall come into force on such date as the Governor-General in Council may, by notification in the Gazette of India, appoint.

Amendment of section 4, Act XI of 1922.

2. To sub-section (3) of section 4 of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act), the following clause shall be added, namely:—

"(*ix*) Any income received by trustees on behalf of a recognised provident fund as defined in clause (*a*) of section 58-A."

Amendment of section 15, Act XI of 1922.

3. In sub-section (3) of section 15 of the said Act, after the word and figure "section 7" the words "and any sums exempted under sub-section (1) of section 58-F" shall be inserted.

Amendment of section 58, Act XI of 1922.

4. In section 58 of the said Act,—

(*a*) in the proviso to sub-section (1), after the word and figures "section 57" the words, figures and letter "and under section 58-H" shall be added; and

(*b*) in sub-section (2), after the word and figures "section 57" the words, figures and letter "and section 58-H" shall be inserted.

Insertion of new Chapter IX-A in Act XI of 1922.

5. After Chapter IX of the said Act the following Chapter shall be inserted, namely:—

"CHAPTER IX-A.

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES OF PROVIDENT FUNDS.

Definitions.

58-A. In this Chapter, unless there is anything repugnant in the subject or context,—

(*a*) a "recognised provident fund" means a provident fund which has been and continues to be recognised by the Commissioner, in accordance with the provisions of this Chapter;

(*b*) an "employer" means—

(*i*) a Hindu undivided family, company, firm or other association of individuals or persons, or

(*ii*) an individual engaged in a business, profession or vocation whereof the profits and gains are assessable to income-tax under section 10 or section 11 maintaining a provident fund for the benefit of his or its employees;

(*c*) an "employee" means an employee participating in a provident fund, but does not include a personal or domestic servant;

(*d*) a "contribution" means any sum credited by or on behalf of any employee out of his salary, or by an employer out of his own monies, to the individual account of an employee, but does not include any sum credited as interest;

(*e*) the "balance to the credit" of an employee means the total amount to the credit of his individual account in a provident fund at any time;

(*f*) the "annual accretion" to the balance to the credit of an employee means the increase to such balance in any year, arising from contributions and interest;

(*g*) the "accumulated balance due" to an employee means the balance to his credit, or such portion thereof as may be claimable by him under the regulations of the fund, on the day he ceases to be an employee of the employer maintaining the fund; and

(*h*) the "regulations of a fund" means the special body of regulations governing the constitution and administration of a particular provident fund.

The according and withdrawal of recognition.

58-B. (1) The Commissioner of Income-tax may accord recognition to any provident fund which, in his opinion, satisfies the conditions prescribed in section 58-C and the rules made thereunder, and may, at any time, withdraw such recognition if, in his opinion, the provident fund contravenes any of those conditions.

(2) The Governor-General in Council may, at his discretion, direct the Commissioner of Income-tax to refuse to accord recognition to any provident fund, or may, at any time, withdraw recognition from any recognised provident fund.

(3) An order according recognition shall take effect on such date as the Commissioner may fix in accordance with any rules the Central Board of Revenue may make in this behalf, such date not being later than the last day of the financial year in which the order is made.

(4) An order withdrawing recognition shall take effect from the day on which it is made.

(5) An employer objecting to an order of the Commissioner refusing to recognise a provident fund may appeal, within sixty days of such order, to the Central Board of Revenue.

The appeal shall be in the form and shall be verified in the manner prescribed by the Central Board of Revenue.

58-C. (1) In order that a provident fund may receive and retain recognition it shall satisfy the conditions set out below and any other conditions which the Governor-General in Council may, by rule, prescribe— Conditions to be satisfied by a recognised provident fund.

(*a*) All employees shall be employed in India, or shall be employed by an employer whose principal place of business is in British India.

(*b*) The contributions of an employee in any year shall be definite proportion of his salary for that year, and shall be deducted by the employer from the employee's salary in that proportion, at each periodical payment of such salary in that year, and credited to the employee's individual account in the fund.

(*c*) Subject to the provisions of section 58-D, the contributions of an employer to the individual account of an employee in any year shall not exceed the amount of the contributions of the employee in that year, and shall be credited to the employee's individual account at intervals not exceeding one year.

(*d*) The fund shall consist of contributions as above specified, of accumulations thereof, and of interest (simple and compound) credited in respect of such contributions and accumulations, and of securities purchased therewith, and of no other sums.

(*e*) The fund shall be vested in two or more trustees, under a trust which shall not be revocable save with the consent of all the beneficiaries.

(*f*) The employer shall not be entitled to recover any sum whatsoever from the fund save in cases where the employee is dismissed for misconduct or voluntarily leaves his employment otherwise than on account of ill-health or other unavoidable cause before the expiration of the term of service specified in this behalf in the regulations of the fund.

In such cases the recoveries made by the employer shall be limited to the contributions made by him to the individual account of the employee, and to interest (simple and compound) credited in respect of such contributions and accumulations thereof, in accordance with the regulations of the fund.

(*g*) The accumulated balance due to an employee shall be payable on the day he ceases to be an employee of the employer maintaining the fund.

(*h*) Save as provided in clause (*g*), or in accordance with such conditions and restrictions as the Governor-General in Council may, by rules, prescribe, no portion of the balance to the credit of an employee shall be payable to him.

(2) Where there is a repugnance between any regulation of a recognised provident fund and any provision of this Chapter

or of the rules made thereunder, the regulation shall, to the extent of the repugnance, be of no effect.

The Commissioner may, at any time, require that such repugnance shall be removed from the regulations of the fund.

Power to relax restrictions of employer's contributions in certain cases.

58-D. Subject to any rules which the Governor-General in Council may make in this behalf, the Commissioner may, in respect of any particular fund, relax the provisions of condition (*c*) of sub-section (1) of section 58-C—

(*a*) so as to permit the payment of larger contributions by an employer to the individual accounts of employees whose salary does not exceed five hundred rupees per mensem; and

(*b*) so as to permit the crediting by employers to the individual accounts of employees of periodical bonuses or other contributions of a contingent nature, where the calculation and payment of such bonuses or other contributions is provided for on definite principles by the regulations of the fund.

Annual accretion deemed to be income received.

58-E. The annual accretion in any year to the balance at the credit of an employee participating in a recognised provident fund shall be deemed to have been received by him in that year and shall be included in his total income for that year, and, subject to the exemptions specified in section 58-F, shall be liable to income-tax and super-tax:

Provided that, for the purpose of sub-section (3) of section 15, out of such annual accretion only the employee's own contributions shall be included in his total income.

Exemption of annual accretion from income-tax.

58-F. (1) An employee shall not be liable to pay income-tax on contributions to his individual account in a recognised provident fund, in so far as the aggregate of such contributions in any year does not exceed one-sixth of his salary in that year.

(2) In the accounts of a recognised provident fund, the contributions exempted from income-tax under sub-section (1) and accumulations thereof shall be shown separately, and interest thereon shall be calculated and shown separately. Such interest shall be exempt from payment of income-tax, in so far as it is allowed at a rate not exceeding such rate as the Governor-General in Council may, by notification in the Gazette of India, fix in this behalf.

Exemption of accumulated balance from income-tax and super-tax.

58-G. (1) Where an employee participating in a recognised provident fund has rendered continuous service with his employer for a period of not less than five years, and the accumulated balance due to him becomes payable, such accumulated balance shall be exempt from payment of income-tax and super-tax, and shall be excluded from the computation of his total income:

Provided that the Commissioner of Income-tax may allow such exemption and exclusion where the employee has rendered conti-

nuous service with the employer for a period of less than five years, if, in his opinion, the service has been terminated by reason of the employee's ill-health, or by the contraction or discontinuance of the employer's business, or other cause beyond the control of the employee.

(2) Where exemption from payment of income-tax is not allowed under the provisions of sub-section (1), the Income-tax Officer shall calculate the total of the various sums of income-tax from the payment of which the contributions and interest credited to the employee's individual account have been exempted under the provisions of sub-sections (1) and (2) of section 58-F, and such total shall be payable by the employee, in addition to any other income-tax for which he may be liable for the year in which the accumulated balance due to him becomes payable.

Deduction at source of income-tax payable on accumulated balances due.

58-H. The trustees of a recognised provident fund or other person authorised by the regulations of the fund to make payment of accumulated balances due to employees, shall, at the time an accumulated balance due to an employee is paid, deduct therefrom any income-tax payable under sub-section (2) of section 58-G and any income-tax and super-tax payable on an employee's total income as determined under sub-section (3) of section 58-J, and sub-sections (4) to (9) of section 18 shall apply as if the sum to be deducted were income-tax payable under the head "Salaries".

Accounts of recognised provident funds.

58-I. (1) The accounts of a recognised provident fund shall be maintained by the trustees of the fund and shall be in such form and for such periods, and shall contain such particulars as the Central Board of Revenue may prescribe.

(2) The accounts shall be open to inspection at all reasonable times by Income-tax authorities, and the trustees shall furnish to the Income-tax Officer such abstracts thereof as the Central Board of Revenue may prescribe.

Treatment of balances in newly recognised provident funds.

58-J. (1) Where recognition is accorded to a provident fund with existing balances, an account shall be made of the fund up to the day before the day on which the recognition takes effect, showing the balance to the credit of each employee on such day, and containing such further particulars as the Central Board of Revenue may prescribe.

(2) The account shall also show in respect of the balance to the credit of each employee the amount thereof which is to be transferred to that employee's account in the recognised provident fund, and such amount (hereinafter called his transferred balance) shall be shown as the balance to his credit in the recognised provident fund on the date on which the recognition of the fund takes effect, and sub-section (3) and (4) shall apply thereto.

Any portion of the balance to the credit of an employee in the existing fund which is not transferred to the recognised fund shall be excluded from the accounts of the recognised fund and shall be liable to income-tax and super-tax in accordance with the provisions of this Act other than this Chapter.

(3) Subject to such rules as the Central Board of Revenue may make in this behalf, the Income-tax Officer shall make a calculation of the aggregate of all sums comprised in a transferred balance which would have been liable to income-tax if this Chapter had been in force from the date of the institution of the fund, without regard to any tax which may have been paid on any such sum, and such aggregate (if any) shall be deemed to be income received by the employee in the year in which the recognition of the fund takes effect, and shall be included in the employee's total income for that year; and, for the purposes of assessment, the remainder of the transferred balance shall be disregarded, but no other exemption or relief, by way of refund or otherwise, shall be granted in respect of any sum comprised in such transferred balance:

Provided that, in cases of serious accounting difficulty, the Commissioner shall have power subject to the said rules, to make a summary calculation of such aggregate.

(4) Notwithstanding anything contained in condition (*h*) of sub-section (1) of section 58-C, an employee, in order to enable him to pay the amount of tax assessed on his total income as determined under sub-section (3), shall be entitled to withdraw from the balance to his credit in the recognised provident fund a sum not exceeding the difference between such amount and the amount to which he would have been assessed if the transferred balance had not been included in his total income.

(5) Nothing in this section shall affect the rights of the persons administering an unrecognised provident fund or dealing with it, or with the balance to the credit of any individual employee, before recognition is accorded, in any manner which may be lawful.

Treatment of fund transferred by employer to trustee.

58-K. (1) Where an employer who maintains a provident fund (whether recognised or not) for the benefit of his employees and has not transferred the fund or any of it, transfers such fund or portion to trustees in trust for the employees participating in the fund, the amount so transferred shall be deemed to be of the nature of capital expenditure.

(2) When an employee participating in such fund is paid the accumulated balance due to him therefrom, any portion of such balance as represents his share in the amount so transferred to the trustee (without addition of interest, and exclusive of the employee's contributions and interest thereon) shall be deemed to be an expenditure by the employer within the meaning of clause (*ix*)

of sub-section (2) of section 10, incurred in the year in which the accumulated balance due to the employee is paid.

58-L. (1) All rules made under this Chapter shall be subject to the provisions of sub-sections (4) and (5) of section 59. **Provisions relating to rules.**

(2) In addition to any power conferred by this Chapter, the Governor-General in Council may make rules—

(*a*) prescribing the statement, and other information to be submitted with an application for recognition;

(*b*) limiting the contributions to a recognised provident fund by employees of a company who are shareholders in the company;

(*c*) providing for the assessment by way of penalty of any consideration received by an employee for an assignment of, or creation of a charge upon, his beneficial interest in a recognised provident fund;

(*d*) determining the extent to and the manner in which exemption from payment of income-tax and super-tax may be granted in respect of contributions and interest credited to the individual accounts of employees in a provident fund from which recognition has been withdrawn; and

(*e*) generally, to carry out the purposes of this Chapter and to secure such further control over the recognition of provident funds and the administration of recognised provident funds as he may deem requisite.

58-M. This Chapter shall not apply to any provident fund to which the Provident Funds Act, 1925, applies. **Application of this Chapter.**

THE INDIAN TERRITORIAL FORCE (AMENDMENT) ACT, 1929.

ACT No. XIII OF 1929.

PREFATORY NOTE.—"Section 5 of the Indian Territorial Force Act, 1920, as it stood before this amendment, permitted the enrolment in the Indian Territorial Force of only those subjects of Indian States who were for the time being resident in a province of British India. It did not permit the enrolment of subject of Indian States who continued to reside in the territories of their respective States.

A comparatively small number of Indian State subjects who reside in Indian States have already been enrolled in certain units of the Indian Territorial Force under a misinterpretation of the law; and the Act is intended to legalise the position of these men."—(See *Statement of Objects and Reasons*.)

[1st October, 1929.]

An Act further to amend the Indian Territorial Force Act, 1920, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Territorial Force Act, 1920, for the purpose hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TERRITORIAL FORCE (AMENDMENT) ACT, 1929.

Amendment of section 5, Act XLVIII of 1920.

2. After sub-section (2) of section 5 of the Indian Territorial Force Act, 1920, the following sub-section shall be added, namely:—

"(3) The Governor-General in Council may, by notification in the Gazette of India, declare in respect of any State in India the Province in which persons residing in that State may be enrolled, and persons so residing shall thereupon be deemed for all purposes of this Act to reside in that Province."

THE INDIAN COTTON CESS (AMENDMENT) ACT, 1929.

ACT No. XIV OF 1929.

PREFATORY NOTE—The necessity for the passing of this Amending Act has been thus explained in the Statement of Objects and Reasons:—

"In paragraph 58 of their report, the Royal Commission on Agriculture recommended that on the constitution of the Council of Agricultural Research, the post of Agricultural Adviser to the Government of India should be abolished and that the Chairmanship of the Indian Central Cotton Committee, which is now held by the Agricultural Adviser *ex officio* under section 5 of the Indian Cotton Cess Act, 1923 (XIV of 1923), should be taken over by the Chairman of the Research Council. The Imperial Council of Agricultural Research has now been established but, under the scheme as modified by the Government of India, the advisory duties of the Agricultural Adviser will be taken over by the Vice-Chairman and his two expert colleagues It is, therefore, proposed that the words "the Vice-Chairman of the Imperial Council of Agricultural Research" should be substituted for the words "Agricultural Adviser to the Government of India" occurring in sections 4 (1) and 5 (2) of the Indian Cotton Cess Act, 1923.

It is also considered desirable that advantage should be taken of this opportunity to provide for the appointment of the Expert Adviser to the Imperial Council of Agricultural Research in agricultural matters as an *ex-officio* member of the Indian Central Cotton Committee under section 4 of the Act. The Indian Central Cotton Committee have been consulted and have accepted both these proposals"

[1st October, 1929.]

An Act further to amend the Indian Cotton Cess Act, 1923, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Cotton Cess Act, 1923, for the purposes hereinafter appearing; it is hereby enacted as follows:—

1. This Act may be called THE INDIAN COTTON CESS (AMENDMENT) ACT, 1929. Short title.

2. In section 4 of the Indian Cotton Cess Act, 1923 (hereinafter referred to as the said Act),— Amendment of section 4, Act XIV of 1923

(*i*) in clause (*i*), for the words "the Agricultural Adviser to the Government of India," the words "the Vice-Chairman of the Imperial Council of Agricultural Research" shall be substituted; and

(*ii*) after clause (*i*) the following clause shall be inserted, namely:—

"(*i-a*) the Expert Adviser to the Imperial Council of Agricultural Research in agricultural matters;".

3. In sub-section (2) of section 5 of the said Act, for the words "The Agricultural Adviser to the Government of India," the words "The Vice-Chairman of the Imperial Council of Agricultural Research" shall be substituted. Amendment of section 5, Act XIV of 1923.

THE INDIAN REGISTRATION (AMENDMENT) ACT, 1929.

ACT NO. XV OF 1929.

PREFATORY NOTE.—Section 56 of the Indian Registration Act, 1908, directed that every Sub-Registrar shall send periodically to the District Registrar a copy of all entries made by him in Indexes Nos I, II and III and that every Registrar receiving such copy shall file it in his office. The preparation of duplicate indexes had been found to be wasteful of time and labour and served no useful purpose. The Local Governments and Administrations were agreeable to the deletion of section 56 of the Act and the Act provides for this.—(See *Statement of Objects and Reasons.*)

[*1st October*, 1929.]

An Act further to amend the Indian Registration Act, 1908, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Registration Act, 1908, for the purpose hereinafter appearing; it is hereby enacted as follows:—

1. This Act may be called THE INDIAN REGISTRATION (AMENDMENT) ACT, 1929. Short title.

2. Section 56 of the Indian Registration Act, 1908, is hereby repealed. Repeal of section 56, Act XVI of 1908.

THE BURMA SALT (AMENDMENT) ACT, 1929.

ACT NO. XVI OF 1929.

PREFATORY NOTE.—The necessity for the passing of this Act has been thus explained in the Statement of Objects and Reasons:—

"Section 5 of the Burma Salt Act, 1917 (Burma Act II of 1917), as now in force, empowers the Central Board of Revenue to delegate the power of appointing officers to the Commissioner of Salt Revenue, Burma, but does not allow the Commissioner further to delegate the power of appointment to the Collector or to Superintendents. It is desirable that there should be such delegation in respect of subordinate ranks, and it is proposed to achieve this object by amending section 5 (*d*) of the Burma Salt Act.

2 It is proposed to utilise this opportunity also to carry out two small drafting amendments of a purely formal nature."

[1*st October*, 1929.]

An Act further to amend the Burma Salt Act, 1917, *for certain purposes.*

WHEREAS it is expedient further to amend the Burma Salt Act, 1917, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE BURMA SALT (AMENDMENT) ACT, 1929.

Amendment of section 5, Burma Act II of 1917.

2. In section 5 of the Burma Salt Act, 1917,—

(*a*) in clause (*a*), the word "other," in both places where it occurs, shall be omitted;

(*b*) in clause (*b*), for the word, letter and brackets "clause (*b*)," the word, letter and brackets "clause (*a*)" shall be substituted; and

(*c*) in clause (*d*), after the words "conferred on them by" the words "or under" shall be inserted.

THE GUARDIANS AND WARDS (AMENDMENT) ACT, 1929.

ACT NO. XVII OF 1929.

PREFATORY NOTE.—The necessity for the passing of this Act has been thus explained in the Statement of Objects and Reasons:—

"The Guardians and Wards Act, 1890, contains no specific provision for the auditing of the accounts of minors' estates and the meeting of the cost of the audit out of the estates The audit of such accounts tends to be left to the Judges of Subordinate Courts or District Courts or to ministerial officers, who have rarely the time or training to apply anything in the nature of a thorough test With a view to checking the possibility of defalcation an adequate audit of these accounts is desirable Accordingly the present Bill has been framed for the purpose of giving express power to the Court to award remuneration for auditing accounts out of the income of the property Clause 3 empowers the High Court to make rules as to the audit of the accounts, the class of persons who should be appointed to audit them and the scales of remuneration to be granted to the auditors."

[*1st October*, 1929.]

An Act further to amend the Guardians and Wards Act, 1890, *for a certain purpose.*

WHEREAS it is expedient further to amend the Guardians and Wards Act, 1890, for the purpose hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE GUARDIANS AND WARDS (AMENDMENT) ACT, 1929.

Insertion of new section 34-A in Act VIII of 1890.

2. After section 34 of the Guardians and Wards Act, 1890 (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

Power to award remuneration for auditing accounts.

"34-A. When accounts are exhibited by a guardian of the property of a ward in pursuance of a requisition made under clause (*c*) of section 34 or otherwise, the Court may appoint a person to audit the accounts, and may direct that remuneration for the work be paid out of the income of the property."

Amendment of section 50, Act VIII of 1890.

3. In sub-section (1) of section 50 of the said Act, after clause (*f*) the following clause shall be inserted, namely:—

"(*ff*) as to the audit of accounts under section 34-A, the class of persons who should be appointed to audit accounts, and the scales of remuneration to be granted to them;".

THE INDIAN SUCCESSION (AMENDMENT) ACT, 1929.

ACT No. XVIII OF 1929.

PREFATORY NOTE.—The necessity for the passing of this Act has been thus explained in the Statement of Objects and Reasons:—

"The Indian Succession Act, 1865 (X of 1865), contained in section 3 a definition of the expression "District Judge" which was wide enough to include and was always held to include a Judge of the High Court exercising probate jurisdiction on the Original Side. The Consolidation Act of 1925 (XXXIX of 1925) omitted this definition, with the result that the expression "District Judge" cannot be held to include a High Court in the exercise of its ordinary or extraordinary civil jurisdiction in view of the definition contained in the General Clauses Act, 1897. As the Indian Succession Act of 1925 now stands, numerous powers contained therein and given to District Judges have not been given to the High Court on its Original Side. This effect of the omission of the definition of "District Judge" from the Act of 1925 was apparently not foreseen and it is proposed to restore it. Clause 2 of the Bill gives effect to this proposal.

2. The remaining clauses are intended to supply another omission. Under sub-section (2) of section 57 of the Act of 1925, which was inserted by Act XXXVII of 1926, all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina on or after the 1st January, 1927, in areas outside those where sub-section (1) of that section is in force, are required to be reduced to writing, signed and attested under section 63 of the Act. It is considered that the provisions of the other sections of the Indian Succession Act

set out in Schedule III should be made applicable to the class of wills dealt with in section 57 (2), since the failure to apply these provisions to those wills may lead to the inference that different principles govern them, and once it is decided that this class of wills should be in writing, signed and attested, there is no reason for differentiating it from the wills falling under classes (*a*) and (*b*) of section 57 (1).

The necessary amendments are provided in clauses 3 and 4 of the Bill.

3. In consequence of these amendments Act XXXVII of 1926 and Act XXI of 1928 will no longer be necessary, and it is proposed to repeal them.''

[1*st October*, 1929.]

An Act further to amend the Indian Succession Act, 1925, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Succession Act, 1925, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN SUCCESSION (AMENDMENT) ACT, 1929.

Amendment of section 2, Act XXXIX of 1925.

2. After clause (*b*) of section 2 of the Indian Succession Act, 1925 (hereinafter referred to as the said Act), the following clause shall be inserted, namely:—

(*bb*) 'District Judge' means the Judge of a principal Civil Court of original jurisdiction;".

Amendment of section 57, Act XXXIX of 1925.

3. (1) Sub-section (1) of section 57 of the said Act shall be renumbered as section 57, and after clause (*b*) and before the proviso the word "and" and the following clause shall be added, namely:—

"(*c*) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (*a*) and (*b*):".

(2) Sub-section (2) of section 57 of the said Act shall be omitted.

Amendment of section 213, Act XXXIX of 1925.

4. In sub-section (2) of section 213 of the said Act, for the word "class" the word "classes" and for the words and figures "sub-section (1) of section 57" the words, letters and figures "clauses (*a*) and (*b*) of section 57" shall be substituted.

Repeals.

5. The enactments specified in the Schedule are hereby repealed.

THE SCHEDULE.

ENACTMENTS REPEALED.

(*See section* 5.)

Year.	No.	Short title.
1926	XXXVII	The Indian Succession (Amendment) Act, 1926.
1928	XXI	The Indian Succession (Second Amendment) Act, 1928.

THE CHILD MARRIAGE RESTRAINT ACT, 1928.

ACT NO. XIX OF 1929.

PREFATORY NOTE —The necessity for the passing of this Act was explained as follows in the original Statement of Objects and Reasons:—

"1. The object of the Bill is twofold. The main object, by declaring invalid the marriages of girls below 12 years of age, is to put a stop to such girls becoming widows The second object, by laying down the minimum marriageable ages of boys and girls, is to prevent, so far as may be, their physical and moral deterioration by removing a principal obstacle to their physical and mental development

2. According to the Census Report of 1921 A.D., there were in that year 612 Hindu widows who were less than one year old, 2,024 who were under 5 years, 97,857 who were under 10 years, and 332,024 who were under 15 years of age. The deplorable feature of the situation, however, is that the majority of these child widows are prevented by Hindu custom and usage from remarrying. Such a lamentable state of affairs exists in no country, civilized or uncivilized, in the world. And it is high time that the law came to the assistance of these helpless victims of social customs, which, whatever their origin or justification in old days, are admittedly out of date and are the source of untold misery and harm at the present time.

3 According to the Brahmanas, the most ancient and the most authoritative book containing the laws of the Hindus, the minimum marriageable age of a man is 24 and a woman 16. And if the welfare of the girl were the only consideration in fixing the age, the law should fix 16 as the minimum age for the valid marriage of a girl. But amongst the Hindus, there are people who hold the belief that a girl should not remain unmarried after she attains puberty. And as in this country, some girls attain puberty at an age as early as 12, the Bill fixes 12 as the minimum age for the valid marriage of a Hindu girl

4 In order, however, to make the Bill acceptable to the most conservative Hindu opinion, provision is made in the Bill that for conscientious reasons, the marriage of a Hindu girl would be permissible even when she is 11 years old. No Hindu Sastra enjoins marriage of a girl before she

attains puberty, and the time has arrived and public opinion sufficiently developed, when the first step towards the accomplishment of the social reform so necessary for the removal of a great injustice to its helpless victims and so essential to the vital interests of a large part of humanity, should be taken, by enacting a law declaring invalid the marriages of girls below 11 years of age.

5. With regard to boys, the Sastras do not enjoin marriage at a particular age Thoughtful public opinion amongst the Hindus would fix 18 as the minimum marriageable age for a boy. But as some classes of the Hindus would regard such legislation as too drastic, the Bill takes the line of least resistance by providing 15 years as the age below which the marriage of a Hindu boy shall be invalid Even in England, where child marriages are unknown and early marriages are exceptions, it has been found necessary to fix the ages below which boys and girls may not marry ''

The following is the Report of the Select Committee on the Bill.—

''We have considered the Bill and the opinions in considerable detail, and a number of matters were discussed to which we do not think it necessary to refer in this report, as no serious difference among the members of our Committee was disclosed in regard to them. We shall, therefore, refer only to the decisions which either have resulted in an amendment of the Bill or have been arrived at by a vote of the majority of the Committee.

Clause 2.—We considered a suggestion that the minimum age to determine whether a female is a child for the purposes of sub-clause (a) should be reduced to 11 and another suggestion that it should be reduced to 12 years. The Committee, however, were emphatically of opinion that any such reduction would nullify the whole object of the Bill.

Clause 5—We considered that this clause, as originally drafted by the Select Committee, would include within its scope a betrothal ceremony which, though it might be a necessary preliminary to a marriage, would not constitute a marriage without a further ceremony.

We are further of opinion that the clause would spread the net too wide by including too large a number of persons, and that it is only necessary to penalise the person who actually officiates in that part of the ceremony which finally renders the marriage tie indissoluble.

We consider it necessary to exempt any person who has officiated at a child marriage but who can prove to the Court that he had taken reasonable precautions to satisfy himself that the contracting parties were over the minimum age.

Finally, we negatived a proposal to re-insert a provision on the lines of clause 6 of the Bill as introduced, whereby a guardian could obtain a certificate enabling him to celebrate a child marriage on the ground that he conscientiously believes the marriage to be enjoined by his religion.

Clause 6.—We have provided that the punishment of imprisonment shall not be inflicted in the case of a female parent or guardian, and we rejected a proposal for the omission of the presumption contained in the second part of this clause, as we consider the presumption reasonable in itself and necessary to enable the provisions of the clause to have their proper effect.

Clause 11—We rejected two proposals in regard to this clause; one that the bond should be a personal bond without sureties, and the other that security should not be required in the case of a complaint made with the sanction of a Magistrate competent to try the offence. The latter provision

might, we consider, lead to two separate inquiries and unnecessary recapitulation of evidence

We have made a few drafting changes to which it is unnecessary for us to refer in detail, and we have rejected a proposal which is to be found amongst the opinions upon the Bill that the Act should be applicable locally by notification of the Local Government. We think that a provision of this kind would greatly facilitate evasion of the law by enabling a child marriage to be conducted in a province in which the law was not in force, although the contracting parties belonged to a province to which it had been applied.—(*Report of Select Committee*)

The following Minutes of Dissent were also appended to the Select Committee's Report:—

"The principle of the Bill affects the personal law of the Mussalmans and therefore it should not be applicable to the Mussalmans at all I am therefore of opinion that the Mussalmans should be exempted from the operation of the Bill."—(*Muhammad Rafique*)

"I think that the provision relating to the throwing of the burden of proving want of knowledge on the person who operates at a marriage is not justifiable. This burden should always be on the prosecution. I am also not in agreement with the provision that the parent or guardian should prove that he did not fail negligently to prevent a child marriage of his son or daughter or ward.

The provision relating to the furnishing of sureties is another matter where I feel myself unable to agree. I would further favour a provision for registration of marriages."—(*Thakurdas Bhargava*)

"I agree to the report of the Committee with the following observations:—After the report of the last Select Committee the Bill was re-circulated for eliciting opinion thereon I have carefully gone through the opinions collected from representative quarters, and the Committee have ascertained the orthodox South Indian view in the matter in other ways. There is no denying the probability that there are influential sections among our people who may be out to arrest the progress of the operation of the Act, and this will mean extreme hardship to many. People may be in danger of being compelled to lose occupation and means of their livelihood. I may here, for instance, indicate the cases of many temple priests. This seems more probable when in many cases leaders of our community have nothing to do with marriage or family life. I should like to put in a clause making it illegal for people, especially people having no family life, to associate themselves in any attempt at excommunication of the man performing marriage under provisions of this Act. But under the circumstances such a provision may not be possible

There may be other instances also where a poor man may require to marry two girls together, or a dying parent may like to see the child married before death for various reasons, and other cases of like nature.

I, therefore, feel that some room should be given to such hard cases. It is not however easy to give an exhaustive list of these cases as a Schedule to this Act. Then the question arises as to the authority competent to deal with such hard cases and give relief in the best exercise of its discretion It seems to me that such power should not be entrusted to a Criminal Court which is not quite in touch with cases of hardship of various kinds. I will therefore entrust the power to the principal court of civil jurisdiction in the districts and the City civil court in the metropolis or a court corresponding to it in the provinces. I wish that a general provision be made to the following effect:

Nothing in this Act shall apply to a case of child marriage where the girl married is not below 12 years of age and where the contracting parties or the parents or guardians have obtained the sanction of the principal court of civil jurisdiction upon an application made prior to the solemnization of the marriage stating the circumstances under which they are compelled to solemnise the marriage the non-performance of which would mean hardship to the girl or her family.

In section 9, I think the period should be less than one year, at most 3 months."—(*Nilakantha Das.*)

"I sign the report subject to the observation that an overwhelming majority of the Mussalmans, including eminent and distinguished Olamas, is strongly against the application of this Bill to the Muslim Community on the ground that it interferes with their religion."—(*Muhammad Yakub.*)

"Subject to note of dissent that the Bill as now drafted is shorn of all utility and amounts to a pious resolution at social reform."—(*H A. J Gidney*)

"I do not agree with the majority of my colleagues on two important points. The proposal to make marriages of girls below the age of 14 years punishable by law has rightly roused much opposition among the large body of orthodox Hindus I urged that the age should be fixed at 11 so that a law to restrain child marriages might be passed with the unanimous support of all sections of the community Kumar Ganganand Sinha proposed that 12 should be substituted for 14. But that also was rejected by the majority. If even 12 is fixed as the age marriages below which shall be punishable, it is possible that a section of orthodox opinion will be reconciled to it. But in view of the fact that marriage is a religious sacrament among Hindus, and in view of the belief which has prevailed on the question of the age of marriage among them for a very long time, to make a marriage above the age of 12 and below the age of 14 punishable by law will be a violent interference with the Hindu religion which I consider it my duty strongly to oppose. We must not forget that even in England the legal marriageable age for girls is 12 years I think we should leave the raising of the age of the marriage of girls beyond 12 to the greater spread of education and of ideas of social and physical well being among the people. Their effects are already visible and should not be ignored.

I am also opposed to imprisonment being awarded as a punishment to any person who offends against the provisions of the proposed law. I expect that if the Government and the public will co-operate to have a knowledge of the provisions of the Act made universally known among the people, the fear of the infliction of a fine which may extend up to a thousand rupees and the approbrium of being exposed to a prosecution will act as effective deterrents to prevent people from celebrating child marriages in contravention of the provisions of the proposed law. In any event, I would not provide imprisonment as an alternative punishment for the first few years of the new legislation "—(*M. M. Malaviya.*)

"I think 14 years will be considered too high to be the minimum marriageable age for girls by a large section of the Hindu community. I am aware of the fact that communities like the Mahomedan, the Christian, the Parsi and even a considerable section of the Hindu community to all of whom this Bill has now been made applicable, will regard the declaration of the legal age for marriage of girls below 14 years as a retrograde measure and a possible incentive to reduce the age of marriage in their respective societies But I am also not oblivious of the very strong opinion in favour of pre-puberty marriage, held by a very large section of the Hindu community. They look upon marriage as a sacrament; and, generally speaking,

to them, the celebration of marriage does not necessarily mean the consummation of marriage.

We see that the Hindu Mahasabha having within its fold various sections of the Hindu community fixes 12 years as the minimum age for the marriage of girls and so does the All-India Sanatana Dharma Mahasabha representing the most orthodox section of the Hindu community. Its resolution No. 7 passed at its sitting held at Allahabad in January 1928, under the presidency of Pandit Madan Mohan Malaviya, when translated into English will read thus:—

"7. (a) In the opinion of this Sanatana Dharma Mahasabha no marriage of a Hindu boy should take place till he is 18 years of age.

(b) This Mahasabha exhorts the Hindu community that the marriage of girls should never be celebrated before they have entered upon their 12th year."

But in the subsequent resolution No. 8, it clearly indicates that the cosummation of marriage should not take place before the girl attains her 16th year.

The translation of the resolution is as follows:—

"8 In the opinion of this Sanatana Dharma Mahasabha, it is extremely necessary in order to make the community physically and religiously strong, that even when the wedding ceremony has been performed the consummation of marriage should not take place till the girl has attained the age of 16 years."

This measure is the first effort of its kind and I am of opinion that the line of least resistance should be adopted in this matter by all those who want its success. The fixing of minimum age limit has by no means a binding effect on the higher age. For instance, we see that in several Western countries, the age of consent is much below the age in which marriages usually take place. That being so, I think that it is but proper that the views of such a large number of people should not be ignored and that the minimum marriageable age for girls should be fixed at twelve years. If any legal protection be deemed necessary in respect of the consummation of marriage, that might be afforded to the girls by further raising the age of consent. Of course it might be argued that the age of consent clause of the Indian Penal Code is a dead-letter But it must also be recognised that any social legislation if it has to succeed must not be so drastic as to make it wholly unacceptable to a large number of people. I hope, therefore, that those who advocate the raising of the minimum marriageable age of girls higher than 12, would appreciate the difficulties underlying its acceptance and be content with fixing the minimum marriageable age of girls at 12 years. We should wait to see the measure of success that the piece of legislation achieves in this modified form"—(*Ganganand Sinha.*)

[*1st October*, 1929.]

An Act to restrain the solemnisation of child marriages.

WHEREAS it is expedient to restrain the solemnisation of child marriages; it is hereby enacted as follows:—

1. (1) This Act may be called THE CHILD MARRIAGE RESTRAINT ACT, 1928. Short title, extent and commencement.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of April, 1930.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age;

(*b*) "child marriage" means a marriage to which either of the contracting parties is a child;

(*c*) "contracting party" to a marriage means either of the parties whose marriage is thereby solemnised; and

(*d*) "minor" means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty one years of age marrying a child.

3. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.

Punishment for male adult above twenty-one years of age marrying a child.

4. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Punishment for solemnising a child marriage.

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

Punishment for parent or guardian concerned in a child marriage.

6. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that, where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

Imprisonment not to be awarded for offences under section 3.

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

8. Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act.

Jurisdiction under this Act.

9. No Court shall take cognizance of any offence under this Act save upon complaint made within one year of the solemnisation of the marriage in respect of which the offence is alleged to have been committed.

Mode of taking cognizance of offences.

10. The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

Preliminary inquiries into offences under this Act.

11. (1) At any time after examining the complainant and before issuing process for compelling the attendance of the accused, the Court shall, except for reasons to be recorded in writing, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898; and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.

Power to take security from complainant.

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

THE TRANSFER OF PROPERTY (AMENDMENT) ACT, 1929.

ACT No. XX OF 1929.

PREFATORY NOTE.—The necessity for the passing of this Act has been explained as follows in the Statement of Objects of Reasons.—

Although the Transfer of Property Act was enacted on the 17th February 1882, it was in 1870 that its first draft in the form of rules was prepared by the first Indian Law Commission, consisting of Lord Romilly M. R, Sir Edward Ryan, formerly Chief Justice of Bengal, Lord Sherbrooke, Sir Robert Lush and Sir John McLeod who assisted Lord Macaulay in framing the Indian Penal Code. The Bill was again examined in 1879 by the Second Indian Law Commission consisting of Sir Charles Turner, the then Chief-Justice of Madras, Sir Raymond West, Judge of the Bombay High Court, and Mr Whitley Stokes, Law Member of the Governor-General's Council It appears that no less than seven Bills were prepared before the final Bill was passed into Law in 1882. We fully recognize that any attempt to amend an Act which was the result of such long and careful consideration at the hands of eminent lawyers and jurists has to be made with the utmost caution On the other hand, the passage

of time has brought recognition to new principles in the law of property, and the conflict of judicial decisions with regard to some of its provisions and defects revealed by experience of its working for nearly half a century has made a revision of the Act necessary.

During the period of forty-five years that the Act has been in force a large mass of conflicting decisions have arisen with regard to various provisions. As early as 1903, in his letter dated the 21st August 1903, Mr. Justice Rampini (afterwards Sir Robert Fulton), while commenting on the Bill introduced for the amendment of section 59 of the Transfer of Property Act, suggested to the Government of India the propriety of undertaking a general and thorough revision of the Act. In paragraphs 3 and 4 of his letter he observed as follows:—

"The Transfer of Property Act was passed nearly 25 years ago, and was the first Act of the Legislature to embody the provisions of the Bengal Regulations of 1798 and 1806 and of the Bombay Regulations of 1827. It is usual to revise the Codes of the Indian Legislature after periods of about twenty years, and it is the more necessary to do so in the case of the Transfer of Property Act because—

(1) it is the first Act dealing with a branch of law it relates to, and

(2) during the past 25 years a large mass of conflicting case-law on the subject has grown up which it is advisable now either to embody in the Act or to set aside.

"Dr. Rash Behari Ghosh has observed in the preface to the third edition of his work on 'The Law of Mortgage in India' that 'there is scarcely a single section in the Chapter on the mortgages in the Transfer of Property Act on which conflicting rulings cannot be found.' I would go even further and say that not only in respect of the Chapter on mortgages but in respect of almost all the Chapters of the Act there is a conflict of opinion between several High Courts."

Since the passing of the Transfer of Property Act in 1882, its provisions have been amended on twelve occasions.* But it does not appear that the general revision of the Act was undertaken or any new principle of importance or substance introduced.

Most of the provisions of Act IV of 1882 had been based on the decisions of the Courts of Equity in England before 1881, which had already been followed by Indian Courts. The Conveyancing Act, 1881 (44 & 45 Vict, c. 41), was passed in the previous year, but, with the exception of a few provisions, such as sections 57, 61 and 69 of the Transfer of Pro-

*1. Act III of 1885, amending sections 1, 4, 6 (*i*) and 9

2 Act XV of 1895, saving Crown grants

3 Act II of 1900, amending sections 3, 6 (*c*) and (*h*) and Chapter VIII.

4. Act VI of 1904, amending sections 1, 59, 105, and 117

5. Act V of 1908, repealing sections 85 to 90, 92, 94, 96 and 97 and re-enacting them in Order XXXIV of the Code of Civil Procedure

6 Act II of 1915, amending sections 59 and 69

7 Act XXVI of 1917, validating certain transactions made in Agra and Oudh and saving them from the provisions of section 59

8. Act XXXVIII of 1920, amending sections 1 and 117

9 Act XXXVIII of 1925, amending section 130

10. Act XXVII of 1926, amending section 3 and inserting the definition of "attestation" as further amended by Act X of 1927.

11. Act X of 1927, amending section 8

12 Madras Act III of 1922, modifying the whole Act so as to give effect to the provisions of the Madras City Tenants' Protection Act, 1922.

perty Act, the provisions of that Act were not used in drafting Act IV of 1882 Since 1882 the Conveyancing Act has been revised in England several times and the whole law of property is now consolidated and codified in the new Property Act, 1925 (15 & 16 Geo. V, c. 20).

In examining the two Bills which were submitted for our consideration we have scrutinized the provisions of the Transfer of Property Act section by section in order to ascertain if any of the sections not included in the Bills required amendment in view of the amendments proposed in the Bills or in the light of judicial decisions or other circumstances With regard to the provisions which are based on the principles of English law or the decisions of English courts, we have carefully examined the provisions of the English Property Act to see whether any change is necessary on the lines of the provisions of that Statute. Where it was found that the existing provisions of the Act or the new provisions proposed to be introduced in the Bills could be drafted on the lines of the English Act, we have tried to do so In our opinion this will facilitate the interpretation of those provisions as the courts will have the benefit of English decisions.

It was brought to our notice that the following points in connexion with the two Bills remitted to our consideration had been circulated to Local Governments for opinion:—

(1) The application of the Transfer of Property Act to territories to which it has not yet been applied, *e g*, Burma, Sind and the Punjab.

(2) The omission of the provision in section 2 exempting or saving the rules of Hindu, Muhammadan and Buddhist laws from the operation of the provisions of Chapter II of the Transfer of Property Act.

(3) The provision making registration amount to notice of documents registered.

(4) Compulsory registration of all sales, mortgages and leases

(5) The provision requiring leases to be executed by both parties.

(6) The application of Chapter VII of the Transfer of Property Act relating to gifts, to cases governed by the Hindu, Muhammadan and Buddhist laws.

The opinions received were placed before us and we have carefully considered the amendments in their light.

In the Bills submitted to us the policy which appears to have been followed was that no amendment should be attempted which would merely effect an improvement in wording, but that new principles of importance which had been judicially recognized since the passing of the Act should be incorporated. In our opinion it is a sound course to follow, particularly in an Act which has been in force for forty-five years and to whose phraseology the general public and the legal profession have become accustomed. Again, it is not safe to alter any wording which has received judicial interpretation, when the interpretation has not led to any inconvenience in practice or miscarriage of justice. We also agree that the Act must be amended to embody new principles In the amendments which we propose we have also endeavoured to remedy any defect which has led to inconvenience or anomalous results. We have also acted on the principle that it is undesirable to attempt to provide in detail for every possible contingency. No elaboration can be exhaustive, and the only result of over-elaboration would be to cramp the action of the courts and to encourage technicalities Where there has been a conflict of decisions we have endeavoured to set it at rest

Detailed reasons for all amendments proposed by us are given in the notes on clauses, but we think it desirable to draw special attention to

some of the important points of principle which are included in the two Bills.

In the Transfer of Property Act the following important amendments are suggested.—

(*i*) The omission of the words "Hindus and Buddhists" in section 2 whereby the provisions of Chapter II will apply to all cases except those governed by a special rule of Muhammadan Law (clause 3 of the main Bill);

(*ii*) (*a*) the provision making registration amount to notice of a registered document;

(*b*) the provision making constructive notice to an agent notice to the principal (clause 4 of the main Bill);

(*iii*) the validity of transfers in favour of a class, when some members of that class are unable to take (clause 8 of the main Bill),

(*iv*) the validity of a direction as to accumulation for a certain period and for certain purposes (clause 9 of the main Bill);

(*v*) the statutory recognition of the doctrine of part performance (clause 15 of the main Bill);

(*vi*) the compulsory registration of sales and mortgages relating to immoveable property of whatever value, and of all leases except those from month to month or for any term not exceeding one month (clauses 16, 19 and 54 of the main Bill);

(*vii*) the abolition of the remedy of foreclosure in the case of all mortgages except a mortgage by conditional sale or an anomalous mortgage providing expressly for foreclosure (clause 30 of the main Bill);

(*viii*) the provision compelling a mortgagee to exhaust his remedies against the mortgaged property before enforcing his personal remedy (clause 32 of the main Bill);

(*ix*) the amendment of the provisions regarding sale without the intervention of the court (clause 34 of the main Bill);

(*x*) the extension of the principle of 'subrogation' (clause 46 of the main Bill);

(*xi*) the modification of the law of 'merger' (clause 50 of the main Bill);

(*xii*) the provision requiring leases to be executed by both parties (clause 54 of the main Bill).

In Order XXXIV of the Code of Civil Procedure the important amendments are suggested on the following points.—

(*i*) it is made clear that the right of redemption is not extinguished till a final decree is passed or till a sale held in execution of the mortgage decree is confirmed;

(*ii*) detailed provisions are included for the award of interest (clauses 4 and 6 of the Supplementary Bill)

The forms in Appendix D to the First Schedule to the Code of Civil Procedure relating to mortgage decrees are made to conform strictly to the amended rules in Order XXXIV. We have revised the forms and amplified them, and have added some extra forms. We hope these forms will facilitate the drawing up of decrees in Mofussil Courts. In cases where several persons entitled to redeem are parties to a mortgage suit, we propose to abolish the system of allowing successive periods of redemption (clause 8 and Schedule I of the Supplementary Bill)

In the Indian Registration Act we propose to provide that assignments of decrees, orders and awards relating to immoveable property and compro-

mise decrees which affect immoveable property, should always be registered. We also propose that sections 48 and 49 should be amended to empower courts to admit unregistered documents in evidence in giving effect to the doctrine of part performance (clause 9 of the Supplementary Bill).

In the Indian Succession Act, 1925, amendments are suggested conforming to the amendments of sections 15 to 18 of the Transfer of Property Act (clause 10 of the Supplementary Bill)

A provision is added in Chapter II of the Specific Relief Act to give effect to the principle of part performance, embodied in the proposed new section 53-A in the Transfer of Property Act (clause 3 of the Supplementary Bill)

[1st October, 1929.]

An Act further to amend the Transfer of Property Act, 1882, for certain purposes.

WHEREAS it is expedient further to amend the Transfer of Property Act, 1882, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE TRANSFER OF PROPERTY (AMENDMENT) ACT, 1929.

(2) It shall come into force on the first day of April 1930.

Amendment of section 1, Act IV of 1882.

2. In section 1 of the Transfer of Property Act, 1882 (hereinafter referred to as the said Act), for the figures "1877" the figures "1908" shall be substituted.

Amendment of section 2, Act IV of 1882.

3. In section 2 of the said Act, the word "Hindu" and the words "or Buddhist" shall be omitted.

Amendment of section 3, Act IV of 1882.

4. In section 3 of the said Act, for the last paragraph, containing the definition of "notice", the following shall be substituted, namely:—

"'a person is said to have notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, if the instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which a memorandum thereof has been filed by any Sub-Registrar under section 66 of that Act:

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

Amendment of section 4, Act IV of 1882.

5. In section 4 of the said Act, for the figures "1877" the figures "1908" shall be substituted.

Amendment of section 5, Act IV of 1882.

6. In section 5 of the said Act, after the words "or to himself" the words "or to himself" shall be inserted; and to the same section the following paragraph shall be added, namely:—

"In this section 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

Amendment of section 6, Act IV of 1882.

7. In section 6 of the said Act, after clause (*d*) the following clause shall be inserted, namely:—

"(*dd*) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred."

Amendment of section 11, Act IV of 1882.

8. For the second paragraph of section 11 of the said Act beginning with the words "nothing in this section" and ending with the words "in a particular manner" the following shall be substituted, namely:—

"Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transfer may have to enforce such direction or any remedy which he may have in respect of a breach thereof."

Amendment of section 15, Act IV of 1882.

9. In section 15 of the said Act, for the words "as regards the whole class" the following words shall be substituted, namely:—

"in regard to those persons only and not in regard to the whole class."

10. For sections 16, 17 and 18 of the said Act the following sections shall be substituted, namely:— Substitution of new sections for sections 16, 17 and 18, Act IV of 1882.

"16. Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails. Transfer to take effect on failure of prior interest.

17. (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than— Direction for accumulation.

(*a*) the life of the transferor, or

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save, as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(*i*) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(*ii*) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(*iii*) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind." Transfer in perpetuity for benefit of public.

11. In section 39 of the said Act,— Amendment of section 39, Act IV of 1882.

(*a*) the words "with the intention of defeating such right" shall be omitted, and for the words "of such intention" the word "thereof" shall be substituted; and

(*b*) the *illustration* shall be omitted.

12. In section 40 of the said Act, for the words "of the latter property or to compel its enjoyment in a particular manner," the words "in a particular manner of the latter property" shall be substituted. Amendment of section 40, Act IV of 1882.

Amendment of section 43, Act IV of 1882.

13. In section 43 of the said Act, after the word "person" the words "fraudulently or" shall be inserted.

Amendment of section 52, Act IV of 1882.

14. (1) In section 52 of the said Act,—

(*a*) for the words "active prosecution" the word "pendency" shall be substituted;

(*b*) for the words "a contentious" the word "any" shall be substituted; and

(*c*) after the words "suit or proceeding", where they occur for the first time, the words "which is not collusive and" shall be inserted.

(2) To the same section the following *Explanation* shall be added, namely:—

"*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Substitution of new section for section 53, Act IV of 1882.

15. For section 53 of the said Act the following section shall be substituted, namely:—

Fraudulent transfer

"53. (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

16. After section 53 of the said Act the following section shall be inserted, namely:— Insertion of new section 53-A in Act IV of 1882.

"53-A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, Part performance.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

17. In section 55 of the said Act,— Amendment of section 55, Act IV of 1882.

(*a*) in sub-clause (*a*) of clause (1), after the word "property" the words "or in the seller's title thereto" shall be inserted;

(*b*) in sub-clause (*b*) of clause (4), after the word "buyer", where it occurs for the second time, the words "any transferee without consideration or any transferee with notice of the non-payment," shall be inserted; and after the words "on such amount or part" the words "from the date on which possession has been delivered" shall be added; and

(*c*) in sub-clause (*b*) of clause (6), the words "with notice of the payment" shall be omitted.

18. For section 56 of the said Act the following section shall be substituted, namely:— Substitution of new section for section 56, Act IV of 1882.

"56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the Marshalling by subsequent purchaser.

property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

Amendment of section 58, Act IV of 1882.

19. In section 58 of the said Act,—

(*a*) to clause (*c*) the following proviso shall be added, namely:—

"Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale";

(*b*) in clause (*d*)—

(*i*) after the words "Where the mortgagor delivers possession" the words "or expressly or by implication binds himself to deliver possession" shall be inserted;

(*ii*) for the words "and to appropriate them", the words "or any part of such rents and profits and to appropriate the same" shall be substituted; and

(*iii*) after the words "or partly in lieu of interest", for the word "and" the word "or" shall be substituted; and

(*c*) after clause (*e*) the following clauses shall be added, namely:—

"(*f*) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(*g*) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

Amendment of section 59 Act IV of 1882.

20. In section 59 of the said Act,—

(*a*) after the words "a mortgage", where they first occur, the words "other than a mortgage by deposit of title-deeds" shall be inserted; and

(*b*) the third paragraph beginning with the words "Nothing in this section" and ending with the words "a security thereon" shall be omitted.

Insertion of new section 59-A in Act IV of 1882.

21. After section 59 of the said Act the following section shall be inserted, namely:—

References to mortgagors and mortgagees to include persons deriving title from them.

"59-A. Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively."

22. In section 60 of the said Act,— Amendment of section 60, Act IV of 1882.

(*a*) for the word "payable" the word "due" shall be substituted;

(*b*) for the words "the mortgage-deed, if any, to the mortgagor" the following words shall be substituted, namely:—

"to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee",

(*c*) for the word "order" the word "decree" shall be substituted; and

(*d*) after the words "remaining due on the mortgage, except" the word "only" shall be inserted.

23. After section 60 of the said Act the following sections shall be inserted, namely:— Insertion of new sections 60-A and 60-B in Act IV of 1882.

"60-A. (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly. Obligation to transfer to third party instead of re-transference to mortgagor.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

60-B. A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee." Right to inspection and production of documents.

24. For section 61 of the said Act and the *Illustration* thereto the following section shall be substituted, namely:— Substitution of new section for section 61, Act IV of 1882.

"61. A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a con- Right to redeem

separately or simultaneously.

tract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together."

Amendment of section 62, Act IV of 1882.

25. In section 62 of the said Act,—

(*a*) after the word "property", where it first occurs, the words "together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee" shall be inserted;

(*b*) for the words "the interest of the principal money" the words "or any part thereof a part only of the mortgage-money," shall be substituted; and

(*c*) for the words "the principal money," where they occur for the second time, the words "the mortgage-money or the balance thereof" shall be substituted.

Amendment of section 63, Act IV of 1882.

26. In section 63 of the said Act, for the words "at the same rate of interest" the words "with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum" shall be substituted.

Insertion of new section 63-A in Act IV of 1882.

27. After section 63 of the said Act the following section shall be inserted, namely:—

Improvements to mortgaged property.

"63-A. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor."

Amendment of section 64, Act IV of 1882.

28. In section 64 of the said Act, the words "for a term of years" shall be omitted.

Amendment of section 65, Act IV of 1882.

29. In section 65 of the said Act,—

(*a*) in clause (*d*), the words "for a term of years" shall be omitted; and

(*b*) the words "Nothing in clause (*c*), or in clause (*d*), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage" shall be omitted.

30. After section 65 of the said Act the following section shall be inserted, namely:— Insertion of new section 65 A in Act IV of 1882.

"65-A. (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee. Mortgagor's power to lease.

(2) (*a*) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(*b*) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(*c*) No such lease shall contain a covenant for renewal.

(*d*) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(*e*) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section."

31. In section 67 of the said Act,— Amendment of section 67, Act IV of 1882.

(*a*) for the word "payable" the word "due" shall be substituted;

(*b*) for the words "an order", wherever they occur, the words "a decree" shall be substituted; and

(*c*) for clause (*a*) the following clause shall be substituted, namely:—

"(*a*) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or",

Insertion of new section 67-A in Act IV of 1882.

32. After section 67 of the said Act the following section shall be inserted, namely:—

Mortgagee when bound to bring one suit on several mortgages.

"67-A. A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due."

Substitution of new section for section 68, Act IV of 1882.

33. For section 68 of the said Act the following section shall be substituted, namely:—

Right to sue for mortgage-money.

"68. (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:—

(*a*) where the mortgagor binds himself to repay the same;

(*b*) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(*c*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(*d*) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (*a*), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (*a*) or clause (*b*) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property."

Amendment of section 69, Act IV of 1882.

34. In section 69 of the said Act,—

(*a*) the first paragraph beginning with the words "A power conferred by the mortgage-deed" and ending with the words "specify in this behalf" shall be numbered as sub-section (1);

(*b*) in the sub-section so numbered,—

(*i*) for the words "A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases and in no others, namely:—" the following words shall be substituted, namely:—

"Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866, a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:—";

(*ii*) in each of clauses (*b*) and (*c*), after the word "where" the words "a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and" shall be inserted; and

(*iii*) in clause (*c*), for the word "is" the words "was, on the date of the execution of the mortgage-deed," shall be substituted, and after the words "any other town" the words "or area" shall be inserted;

(*c*) the word "But" in the beginning of the second paragraph shall be omitted, and the said paragraph ending with the words "after becoming due" shall be numbered as sub-section (2), and clauses (1) and (2) of the said paragraph shall be lettered as (*a*) and (*b*), respectively;

(*d*) the third paragraph beginning with the words "When a sale has been made" and ending with the words "exercising the power" shall be numbered as sub-section (3);

(*e*) the fourth paragraph beginning with the words "The money which is received" and ending with the words "of the sale thereof" shall be numbered as sub-section (4);

(*f*) for the fifth paragraph beginning with the words "Nothing in the former part" and ending with the words "comes into force" the following sub-section shall be substituted, namely:—

"(5) Nothing in this section or in section 69-A applies to powers conferred before the first day of July, 1882"; and

(*g*) the last paragraph beginning with the words "The powers and provisions" and ending with the words "local official Gazette" shall be omitted.

Insertion of new section 69-A in Act IV of 1882.

35. After section 69 of the said Act the following section shall be inserted, namely:—

Appointment of receiver

"69-A. (1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent. on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent.

on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8). Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—

(*i*) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;

(*ii*) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(*iii*) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(*iv*) in payment of the interest falling due under the mortgagee;

(*v*) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The cost of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage."

Amendment of section 71, Act IV of 1882.

36. In section 71 of the said Act, the words "for a term of years" shall be omitted.

Amendment of section 72, Act IV of 1882.

37. In section 72 of the said Act,—

(*a*) for the words "When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he" the words "A mortgagee" shall be substituted;

(*b*) clause (*a*) shall be omitted;

(*c*) in clause (*b*), for the words "its preservation" the words "the preservation of the mortgaged property" shall be substituted;

(*d*) after the words "nine per cent. per annum" the following proviso shall be inserted, namely:—

"Provided that the expenditure of money by the mortgagee under clause (*b*) or clause (*c*) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title;" and

(*e*) for the words "a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate" the following shall be substituted, namely:—

"added to the principal money with interest at the same rate as is payable on the principal money, or, where no such rate is fixed, at the rate of nine per cent. per annum."

Substitution of new section for section 73, Act IV of 1882.

38. For section 73 of the said Act the following section shall be substituted, namely:—

Right to proceeds of revenue sale or compensation on acquisition.

"73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation,

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due."

39. Section 74 and section 75 of the said Act shall be omitted. Omission of sections 74 and 75, Act IV of 1882.

40. In section 76 of the said Act,— Amendment of section 76, Act IV of 1882.

(*a*) in clause (*c*), after the words "charges of a public nature" the words "and all rent" shall be inserted;

(*b*) in clause (*h*), after the words "deducting the expenses" the words "properly incurred for the management of the property and the collection of rents and profits and the other expenses" shall be inserted, and the words "on the mortgage-money" shall be omitted; and

(*c*) in clause (*i*), the word "gross" shall be omitted, and after the words "as the case may be" the following shall be inserted, namely:—

"and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connexion with the mortgaged property."

41. Section 80 of the said Act shall be omitted. Omission of section 80, Act IV of 1882.

42. For section 81 of the said Act the following section shall be substituted, namely:— Substitution of new section for section 81, Act IV of 1882.

"81. If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties." Marshalling securities.

43. In section 82 of the said Act,— Amendment of section 82, Act IV of 1882.

(*a*) for the first paragraph beginning with the words "Where several properties," and ending with the words "date of the mortgage" the following shall be substituted, namely:—

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned

by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date" and

(*b*) in the third paragraph, for the word "second" the word "subsequent" shall be substituted.

Amendment of section 83, Act IV of 1882.

44. In section 83 of the said Act,—

(*a*) for the words "has become payable" the words "payable in respect of any mortgage has become due" shall be substituted;

(*b*) for the words "if then in his possession or power" the words "and all documents in his possession or power relating to the mortgaged property" shall be substituted;

(*c*) after the word "mortgage-deed," where it occurs for the second time, the words "and all such other documents" shall be inserted; and

(*d*) the following paragraph shall be added after the words "such other person as aforesaid," namely:—

"Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished."

Amendment of section 84, Act IV of 1882.

45. In section 84 of the said Act,—

(*a*) after the words "from the date of the tender or" the words "in the case of a deposit, where no previous tender of such amount has been made", shall be inserted;

(*b*) for the words "as the case may be" the following shall be substituted, namely:—

"and the notice required by section 83 has been served on the mortgagee:

"Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof interest on the principal money shall be payable from the date of such withdrawal"; and

(*c*) after the words "tender of the mortgage-money" the words "and such notice has not been given before the making of the tender or deposit, as the case may be" shall be added.

46. For section 91 of the said Act the following section shall be substituted, namely:— Substitution of new section for section 91, Act IV of 1882.

"91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:— Persons who may sue for redemption.

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(*b*) any surety for the payment of the mortgage-debt or any part thereof; or

(*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property."

47. After section 91 of the said Act the following sections shall be inserted, namely:— Insertion of new sections 92, 93 and 94 in Act IV of 1882.

"92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. Subrogation.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a Prohibition of taking.

subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Rights of mesne mortgagee.

94. Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor."

Substitution of new sections for section 95, Act IV of 1882.

48. For section 95 of the said Act the following sections shall be substituted, namely:—

Right of redeeming co-mortgagor to expenses.

"95. Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

Mortgage by deposit of title-deeds.

96. The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds."

Amendment of section 98, Act IV of 1882.

49. In section 98 of the said Act, for the words "a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms," the words "an anomalous mortgage" shall be substituted.

Amendment of section 100, Act IV of 1882

50. In section 100 of the said Act,—

(*a*) for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to the person having such charge" the words "which apply to a simple mortgage shall, so far as may be, apply to such charge," shall be substituted; and

(*b*) after the words "in the execution of his trust" the following words shall be added, namely:—

"and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

Substitution of new section for section 101 Act IV of 1882.

51. For section 101 of the said Act the following section shall be substituted, namely:—

"101. Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto." No merger in case of subsequent encumbrance.

52. In section 102 of the said Act,— Amendment of section 102, Act IV of 1882.

(*a*) for the words "Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown" the words "Where no person or agent on whom such notice should be served can be found or is known", shall be substituted;

(*b*) after the words "and any notice served in compliance with such direction shall be deemed sufficient" the following proviso shall be inserted, namely:—

"Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made";

(*c*) for the words "Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown" the words "Where no person or agent to whom such tender should be made can be found or is known", shall be substituted; and

(*d*) for the words "in such Court as last aforesaid" the words "in any Court in which a suit might be brought for redemption of the mortgaged property" shall be substituted.

53. In section 103 of the said Act,— Amendment of section 103, Act IV of 1882.

(*a*) after the words "such notice may be served" the words "on or by" shall be inserted; and

(*b*) for the words and figures "Chapter XXXI of the Code of Civil Procedure" the words and figures "Order XXXII in the First Schedule to the Code of Civil Procedure, 1908," shall be substituted.

54. In section 106 of the said Act, for the words "tendered or delivered either personally to the party who is intended to be bound by it," the following shall be substituted, namely:— Amendment of section 106, Act IV of 1882.

"either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party".

55. In section 107 of the said Act, after the words "by delivery of possession", where they first occur, the following paragraph shall be inserted, namely:— Amendment of section 107, Act IV of 1882.

"Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee."

Amendment of section 108, Act IV of 1882.

56. In section 108 of the said Act,—

(*a*) in clause (*h*)—

(*i*) after the words "the lessee may" the words "even after the determination of the lease" shall be inserted; and

(*ii*) for the words "during the continuance of the lease," the words "whilst he is in possession of the property leased but not afterwards," shall be substituted; and

(*b*) in clause (*o*), after the words "or fell" the words "or sell" shall be inserted, and after the words "or damage buildings," the words "belonging to the lessor or" shall be inserted.

Amendment of section 111, Act IV of 1882.

57. In clause (*g*) of section 111 of the said Act,—

(*a*) the words "or the lease shall become void" shall be omitted;

(*b*) after the words "title in himself" the following shall be inserted, namely:—

"or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event";

(*c*) for the words "either case" the words "any of these cases" shall be substituted; and

(*d*) for the words "does some act showing" the words "gives notice in writing to the lessee of" shall be substituted.

Insertion of new section 114-A in Act IV of 1882.

58. After section 114 of the said Act the following section shall be inserted, namely:—

Relief against forfeiture in certain other cases.

"114-A. Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(*a*) specifying the particular breach complained of; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

59. For section 119 of the said Act the following section shall be substituted, namely:— Substitution of new section for section 119, Act IV of 1882.

"119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration." Right of party deprived of thing received in exchange.

60. In section 128 of the said Act, after the words "debts due by" the words "and liabilities of" shall be inserted. Amendment of section 128, Act IV of 1882.

61. In section 129 of the said Act, the words "or, save as provided by section 123, any rule of Hindu or Buddhist law" shall be omitted. Amendment of section 129, Act IV of 1882.

62. In section 130 of the said Act,— Amendment of section 130, Act IV of 1882.

(*a*) after the words "The transfer of an actionable claim" the words "whether with or without consideration" shall be inserted; and

(*b*) the words "and notwithstanding anything contained in section 123" shall be omitted.

63. Nothing in any of the following provisions of this Act, namely, sections 3, 4, 9, 10, 15, 18, 19, 27, 30, clause (*c*) of section 31, sections 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect— Saving clause.

(*a*) the terms or incidents of any transfer of property made or effected before the first day of April 1930,

(*b*) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(*c*) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(*d*) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

THE TRANSFER OF PROPERTY (AMENDMENT) SUPPLEMENTARY ACT, 1929.

ACT NO. XXI OF 1929.

PREFATORY NOTE.—*See* Prefatory Note to Act XX of 1929.

[4th October, 1929.]

An Act to supplement the Transfer of Property (Amendment) Act, 1929.

WHEREAS by reason of the passing of the Transfer of Property (Amendment) Act, 1929, it is expedient that certain amendments should be made in certain other enactments; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE TRANSFER OF PROPERTY (AMENDMENT) SUPPLEMENTARY ACT, 1929.

(2) It shall come into force on the first day of April, 1930.

Amendment of section 8, Act III of 1874.

2. For the proviso to section 8 of the Married Women's Property Act, 1874, the following proviso shall be substituted, namely:—

"Provided that nothing herein contained shall—

(*a*) entitle such person to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage to transfer or charge the same or her beneficial interest therein, or

(*b*) affect the liability of a husband for debts contracted by his wife's agency expressed or implied."

Insertion of new section 27-A in Act I of 1877.

3. After section 27 of the Specific Relief Act, 1877, the following section shall be inserted, namely:—

Specific performance in case of part performance of contract to lease.

"27-A. Subject to the provisions of this Chapter, where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,—

(*a*) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(*b*) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession

in part performance of the contract, and has done some act in furtherance of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section applies to contracts to lease executed after the first day of April 1930."

Substitution of new rules for rules 2 to 8, Order XXXIV, Schedule I, Act V of 1908.

4. In Order XXXIV in the First Schedule to the Code of Civil Procedure, 1908, for rules 2 to 8 the following rules shall be substituted, namely:—

Preliminary decree in foreclosure suit.

"2. (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(*a*) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(*i*) principal and interest on the mortgage,

(*ii*) the costs of suit, if any, awarded to him, and

(*iii*) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or

(*b*) declaring the amount so due at that date; and

(*c*) directing—

(*i*) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared in Court under clause (*b*), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgagee and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(*ii*) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subse-

quent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

Final decree in foreclosure suit.

3. (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(*a*) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(*b*) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

Preliminary decree in suit for sale.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (*a*), (*b*) and (*c*) (*i*) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and

the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

Power to decree sale in foreclosure suit.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

Final decree in suit for sale.

5. (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(*a*) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(*b*) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary—

(*c*) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt within the manner provided in sub-rule (1) of rule 4.

Recovery of balance due on mortgage in suit for sale

6. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance

Preliminary decree in redemption suit.

7. (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(*a*) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(*i*) principal and interest on the mortgage,

(*ii*) the costs of suit, if any, awarded to him, and

(*iii*) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(*b*) declaring the amount so due at that date; and

(*c*) directing—

(*i*) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (*a*), or from the date on which such amount is declared in Court under clause (*b*), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incum-

brances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—

(*a*) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(*b*) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

8. (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order— **Final decree in redemption suit.**

(*a*) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(*b*) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(*c*) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(*a*) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(*b*) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same."

Insertion of new rule 8-A in Order XXXIV, Schedule I, Act V of 1908.

5. In Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, after rule 8 the following rule shall be inserted, namely:—

Recovery of balance due on mortgage in suit for redemption.

"8-A. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance."

Substitution of new rules for rules 10 and 11 of Order XXXIV, Schedule I, Act V of 1908.

6. In Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, for rules 10 and 11 the following rules shall be substituted, namely:—

Costs of mortgagee subsequent to decree.

"10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto; add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

Payment of interest.

11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

(*a*) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(*i*) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(*ii*) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(*iii*) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum; and

(*b*) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(*i*) on the aggregate of the principal sums specified in clause (*a*) and of the interest thereon as calculated in accordance with that clause; and

(*ii*) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10."

Substitution of new rule for rule 15, Order XXXIV, Schedule I, Act V of 1908.

7. In Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, for rule 15 the following rule shall be substituted, namely:—

Mortgages by the deposit of title-deeds and charges

"15. All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882."

Substitution of new Forms for Forms 3 to 11 in Appendix D, Schedule I, Act V of 1908.

8. For Forms 3 to 11 in Appendix D to the First Schedule to the Code of Civil Procedure, 1908, the Forms set forth in the Schedule shall be substituted.

Amendment of Act IX of 1908.

9. In article No. 132 in the First Division of the First Schedule to the Indian Limitation Act, 1908, the following clause shall

be added after clause (*b*) of the Explanation, namely:—

"and

(*c*) advances secured by mortgage by deposit of title-deeds."

Amendment of Act XVI of 1908.

10. (1) In section 17 of the Indian Registration Act, 1908,—

(*a*) after clause (*d*) of sub-section (1) the following clause shall be added, namely:—

"(*e*) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property"; and

(*b*) in clause (*vi*) of sub-section (2) for the words "and any award" the words "except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding" shall be substituted.

(2) In section 48 of the same Act, after the words "or followed by delivery of possession" the following words shall be added, namely:—

"and the same constitutes a valid transfer under any law for the time being in force:

Provided that a mortgage by deposit of title-deeds as defined in section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property."

(3) In section 49 of the same Act—

(*a*) after the word and figures "section 17" the words "or by any provision of the Transfer of Property Act, 1882," shall be inserted; and

(*b*) to that section the following proviso shall be added, namely:—

"Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

Amendment of Madras Act I of 1914.

11. In the Hindu Transfers and Bequests Act, 1914, for sections 3, 4 and 5 the following sections shall be substituted, namely:—

Disposition for the benefit of person not in existence.

"3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any per

son for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely:— Limitations and conditions.

(*a*) in respect of dispositions by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925."

12. (1) In section 3 of the Hindu Disposition of Property Act, 1916,— Amendment of Act XV of 1916.

(*a*) in clause (*a*), for the words and figures "sections 13, 14 and 20" the word and figure "Chapter II" shall be substituted, and

(*b*) in clause (*b*), for the words and figures "sections 100 and 101 of the Indian Succession Act, 1865" the words and figures "sections 113, 114, 115 and 116 of the Indian Succession Act, 1925," shall be substituted.

(2) Section 4 of the same Act shall be omitted.

13. In the Hindu Transfers and Bequests (City of Madras) Act, 1921, for sections 3, 4 and 5 the following sections shall be substituted, namely:— Amendment of Act VIII of 1921.

"3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. Disposition for the benefit of person not in existence

4. The limitations and provisions referred to in section 3 shall be the following, namely:— Limitations and conditions.

(*a*) in respect of disposition by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925."

14. (1) In section 115 of the Indian Succession Act, 1925,— Amendment of Act XXXIX of 1925.

(*a*) for the words "wholly void" the words "void in regard to those persons only and not in regard to the whole class" shall be substituted;

(*b*) in *Illustration* (*i*), for the words "and, as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void" the following words shall be substituted, namely:—

"and in regard to those who do not attain the age of 25 within 18 years after A's death, but is operative in regard to the other children of A"; and

(*c*) in *Illustration* (*ii*), for the words "The mention of B, C and D by name does not prevent the bequest from being re-

garded as a bequest to a class, and the bequest is wholly void" the following words shall be substituted, namely:—

"Although the mention of B, C and D does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children B, C or D, who attains the age of 25 within 18 years after A's death."

(2) For section 116 of the same Act the following section shall be substituted, namely:—

Bequest to take effect on failure of prior bequest.

"116. Where by reason of any of the rules contained in sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void."

(3) For section 117 of the same Act and the *Illustration* thereto the following section shall be substituted, namely:—

Effect of direction for accumulation.

"117. (1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(*i*) the payment of the debts of the testator or any other person taking any interest under the will, or

(*ii*) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

(*iii*) the preservation or maintenance of any property bequeathed;

and such direction may be made accordingly."

(4) In Schedule III to the same Act, after the figures and comma '116,' the figures and comma '117,' shall be inserted.

Savings.

15. (1) Save as provided in sub-section (2), nothing in this Act shall be deemed to affect—

(*a*) the terms or incidents of any transfer or disposition of property made or effected before the first day of April 1930;

(*b*) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date;

(*c*) any right, title, obligation or liability already acquired, accrued or incurred before such date;

(*d*) any remedy or proceeding in respect of such right, title, obligation or liability; or

(*e*) anything done in the course of any proceeding pending in any Court on the aforesaid date;

and any such remedy or proceeding may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

(2) Notwithstanding anything contained in section 9 of this Act, in the Presidency of Bombay and such other territories as the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title-deeds may be instituted within two years from the date of the commencement of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit instituted within the said period of sixty years and pending at the date of the commencement of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable.

SCHEDULE.

(*See section* 8)

FORM No. 3.

Preliminary decree for foreclosure.

(Order XXXIV, rule 2.—Where accounts are directed to be taken)

(TITLE.)

This suit coming on this day, etc.; it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2 And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (*iii*) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(*i*) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs for the costs of the suit awarded to the plaintiff;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 3-A

Preliminary decree for foreclosure.

(Order XXXIV, rule 2.—Where the Court declares the amount due)

(TITLE.)

This suit coming on this day, etc ; it is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the

said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. .

2. And it is hereby ordered and decreed as follows:—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs. ;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 4.

Final decree for foreclosure.

(Order XXXIV, rule 3.)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage.

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; *[and (*if the defendant be in possession of the said mortgaged property*) that the defendant shall

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*Words not required to be deleted.

deliver to the plaintiff quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

FORM No. 5.

Preliminary decree for sale.

(Order XXXIV, rule 4—Where accounts are directed to be taken)

(TITLE.)

This suit coming on this day, etc.; it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(*i*) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed

2. And it is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (*iii*), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the plaintiff;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due

in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property

FORM No. 5-A

Preliminary decree for sale

(Order XXXIV, rule 4.—When the Court declares the amount due)

(TITLE)

This suit coming on this day, etc.; it is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs for the costs of the suit awarded to the plaintiff, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(*i*) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, the said sum of Rs ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

4 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No. 6.

Final decree for sale

(Order XXXIV, rule 5)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of

and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2 And it is hereby further ordered and decreed that the money realized by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

FORM No. 7.

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed.

(Order XXXIV, rule 7.—Where accounts are directed to be taken.)

(TITLE.)

This suit coming on this day, etc.; it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following.—

(*i*) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(*ii*) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(*iii*) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent per annum);

(*iv*) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (*ii*) or adjudged due under clause (*iv*) above, together with

interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendants shall, if so required reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property.

FORM No 7-A.

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXXIV, rule 7—Where accounts are directed to be taken)

(TITLE.)

This suit coming on this day, etc ; it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate

is fixed, at six per cent per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4 And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property free from the said motgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before

the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7 And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

**Description of the mortgaged property*

FORM No. 7-B.

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed

(Order XXXIV, rule 7.—Where the Court declares the amount due)

(TITLE.)

This suit coming on this day, etc.; it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. ;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he

claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 7-C.

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXXIV, rule 7.—Where the Court declares the amount due)

(TITLE)

This suit coming on this day, etc; it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs for the cost of this suit awarded to the defendant, making in all the sum of Rs. .

2. And it is hereby ordered and decreed as follows:—

(*i*) that the plaintiff do pay into Court on or before the day of or any later date up to which time the payment may be extended by the Court the said sum of Rs. ;

(*ii*) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No. 7-D

Final decree for foreclosure in a redemption suit on default of payment by mortgagor

(Order XXXIV, rule 8)

(TITLE)

Upon reading the preliminary decree in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant dated the day of , for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned *[and (*if the plaintiff be in possession of the said mortgaged property*) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

FORM No 7-E

Final decree for sale in a redemption suit on default of payment by mortgagor.

(Order XXXIV, rule 8.)

(TITLE.)

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*Words not required to be deleted.

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of , and the application of the defendant dated the day of , for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with the subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

FORM No 7-F.

Final decree in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree.

(Order XXXIV, rules 3, 5 and 8.)

(TITLE.)

This suit coming on this day for further consideration and it appearing that on the day of the mortgagor or , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the day of ; it is hereby ordered and decreed that—

(*i*) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor* or, as the case may be, who has redeemed the property or an acknowledgment of the payment of the amount due in his favour;

(*ii*) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of reconveyance or acknowledgment in the manner aforesaid,—

(*i*) the said sum of Rs . be paid out of Court to the mortgagee;

(*ii*) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor *[or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor *[or other person making the payment], the said deed of reconveyance or the acknowledgment in the office of the Sub-Registrar of ; and

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*Words not required to be deleted.

(iii) *[if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor *[or such person as aforesaid who has made the payment].

FORM No. 8.

Decree against mortgagor personally for balance after the sale of the mortgaged property

(Order XXXIV, rules 6 and 8-A.)

(TITLE)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be) and reading the final decree passed in the suit on the day of and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs. and have been paid to the applicant out of the Court on the day of . and that the balance now due to him under the aforesaid decree is Rs. ,

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally;

It is hereby ordered and decreed as follows.—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs. with further interest at the rate of six per cent. per annum from the day of (the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application.

FORM No. 9

Preliminary decree for foreclosure or sale

[Plaintiff .. 1st Mortgagee.
v
Defendant No. 1 .. Mortgagor.
Defendant No 2 . 2nd Mortgagee.]

(Order XXXIV, rules 2 and 4.)

(TITLE)

The suit coming on this day, etc.; it is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage-security with interest thereon and the sum of Rs for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. .

Similar declarations to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit

2 It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No 2 *[or (if there are several subsequent mortgagees) that the several parties hereto are entitled

*Words not required to be deleted

in the following order to the payment of the sums due to them respectively:—]

3. And it is hereby ordered and decreed as follows:—

(i) (a) that defendants or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(b) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2; and

(ii) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant No. (who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No. (who has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared to be due to defendant No 2 with such variations as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree—

(i) *[*in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the plaintiff quiet and peaceable possession of the said property, or

(ii) *[*in the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(iii) *[*in the case where a sale is ordered under clause* 4 (*ii*) *above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as

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*Words not required to be deleted.

may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No 2, and that if any balance be left, it shall be paid to the defendant No 1 or other persons entitled to receive the same, and

(*iv*) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively

5 And it is hereby further ordered and decreed—

(*a*) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the plaintiff might have done under clause* 4 *above*)—

*[(*i*) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property;] or

*[(*ii*) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;

and (*b*) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No 1 arising from the plaintiff's mortgage or from the mortgage of defendant No 2 or from this suit shall be deemed to have been discharged and extinguished

6 And it is hereby further ordered and decreed [*in the case where a sale is ordered under clause* 5 *above*]—

(*i*) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount, and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*ii*) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No. 2's mortgage, defendant No. 2 shall be at liberty

*Words not required to be deleted.

(where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

FORM No. 10.

Preliminary decree for redemption of prior mortgage and foreclosure or sale on subsequent mortgage.

[Plaintiff	..	2nd Mortgagee,
v		
Defendant No. 1	..	Mortgagor,
Defendant No. 2	..	1st Mortgagee.]

(Order XXXIV, rules 2, 4 and 7.)

(TITLE.)

The suit coming on this day, etc.; it is hereby declared that the amount due to defendant No 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs. for interest on the said principal, the sum of Rs for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage-security with interest thereon and the sum of Rs. for the costs of this suit awarded to defendant No 2, making in all the sum of Rs.

(Similar declarations to be introduced with regard to the amount due from defendant No. 1 to the plaintiff in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.)

2. It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff *[or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—].

3. And it is hereby ordered and decreed as follows:—

(*i*) (*a*) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2; and

(*b*) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff; and

(*ii*) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (*i*) (*a*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be

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*Words not required to be deleted.

payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

(*i*) *[*in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property; or

(*ii*) *[*in the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(*iii*) *[*in the case where a sale is ordered under clause 4 (ii) above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908; and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(*iv*) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed,—

(*a*) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes

*Words not required to be deleted.

default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree (*in the same manner as the defendant No 2 might have done under clause 4 above*)—

*[(*i*) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

*[(*ii*) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;]

and (*b*) (if on the application of defendant No 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

(*i*) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No 1 or other persons entitled to receive the same; and

(*ii*) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

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*Words not required to be deleted.

FORM No. 11.

Preliminary decree for sale

[Plaintiff—Sub or derivative mortgagee]

v.

Defendant No. 1.—Mortgagor

[Defendant No. 2.—Original mortgagee.]

(Order XXXIV, rule 4.)

(TITLE.)

This suit coming on this day, etc.; it is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs. for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs. .

(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage)

2 And it is hereby ordered and decreed as follows:—

(*i*) that defendant No 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. due to defendant No. 2

(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount)

(*ii*) that, on payment of the sum declared due to defendant No. 2 by defendant No 1 in the manner prescribed in clause 2 (*i*) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1, or to such person as he appoints, and defendant No 2 shall, if so required, reconvey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No 1 quiet and peaceable possession of the said property; and

(*iii*) that, upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908; and that the balance, if any, shall then be paid to defendant No 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage-deed and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3 And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc. [*as in sub-clause (ii) of clause 2.*]

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that, if any balance be left, it shall be paid to defendant No 1 or other persons entitled to receive the same.

6 And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No 1 (as the case may be) for the amount of the balance

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No 2, defendant No 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(*declarations in the ordinary form to be introduced according to the nature of defendant No 2's mortgage and the remedies open to him thereunder*).

8 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

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JULY—DECEMBER, 1929.

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Puisne Judges.

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD CARSON, LORD SALVESEN AND SIR GEORGE LOWNDES.

Subrahmanya Chettiyar and others .. *Appellants** (*Defts.*)

v.

V. P. Subrahmanya Mudaliar and others ..*Respondents* (*Plffs.*).

P. C.

Subrahmanya Chettiyar v. Subrahmanya Mudaliar.

Ryotwari Pattadar—Under-ryots of—Claim to occupancy right by—Proof of—Onus—Quantum—Dispute as to one-half of an estate—Purchase of kudivaram *rights by under-ryots in lands in other half—Evidentiary value of—Words—*Tirwa—Swamibhogam—*Meaning of*

Permanence is not a universal and integral incident of an under-ryot's holding. If claimed, it must be established This may be done by proving custom, contract or a title, and possibly by other means.

The 1st respondent was the owner of a one-half share of an estate called the Chinna Pannai estate, and was *ryotwari pattadar* of one-half undivided share of that estate He brought the suit out of which the appeal arose to establish his right to have all the lands within his title partitioned on the footing that the appellants as a community of cultivators had not acquired the permanent rights of occupancy which they claimed. The appellants admitted that the respondent's predecessors-in-title had been regularly receiving *tirwa swamibhogam* for his share of the lands They raised no objection to a division being effected in respect of the dry and rain-fed lands within the respondent's title But they maintained that the well-irrigated lands and palmyras should be excluded from the partition on the ground that in respect to all of them they were permanent tenants who had acquired by long occupation the *kudivaram* of those lands, subject only to the payment of a fixed annual return at certain specified rates. The appellants succeeded in showing little else than that they had remained in undisturbed possession of some of the land in question for a long period at a more or less uniform rent They did not attempt to prove any custom upon which they could found, and their attempt to prove a contract completely failed. The alienations on which they found all turned out to be of com-

*P.C. Appeal No 10 of 1927 19th March, 1929.

P. C.

Subrahmanya Chettiyar v. Subrahmanya Mudaliar.

paratively recent date, and not of such a kind as would ordinarily be brought to the notice of the pattadar, as they did not in most cases involve any change of tenancy.

Held, that the onus lay on the appellants of proving the existence of their permanent tenancy or occupancy right, and that the facts established in the case were insufficient to discharge that onus

Held also that the fact that in the half of the *chunna pannai* which was not claimed by the respondent some of the appellants actually acquired the *kudivaram* of the land, while not conclusive, militated against their claim.

Tirwa is the share of the rents payable to Government; *Swamibhogam* is the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax

Appeal No. 10 of 1927 from a judgment and decree, dated the 15th October, 1920, of the High Court, Madras (Wallis, C.J. and Sadasiva Aiyar, J.) which varied a judgment and decree, dated the 21st December, 1917, of the Subordinate Judge of Tinnevelly.

The material facts of the case appear sufficiently from their Lordships' judgment.

The sole question for determination on the appeal to His Majesty in Council was: whether the defendants-appellants had established that they possessed a permanent right of occupancy in the well-irrigated and palmyras or garden lands in their possession?

The Subordinate Judge found in favour of the defendants-appellants, but the High Court held the contrary.

The learned Subordinate Judge held, on the question of onus, that the fact that the plaintiff was the ryotwari pattadar of the lands in dispute was not sufficient to prove that the plaintiff was the owner thereof, remarking as follows:—

"A pattadar-plaintiff claiming title to a ryotwari land as against persons in possession who claim right of occupancy therein must, as in all other cases of ejectment, begin and prove his title to the properties he sues for."

The learned Chief Justice, Sir John Wallis, held on appeal that the above view of the Subordinate Judge was erroneous, observing as follows:—

"In considering the main question of occupancy right the Subordinate Judge misplaced the burden of proof, which, in the case of tenancies under ryots whether in ryotwari or zemindari tracts, is on the tenant and not on the landlord, as recently held by the Privy Council in *Seturatnam Aiyar* v *Venkatachala Goundan*,[1] overruling *Venkatachala Goundan* v. *Rangaratnam Aiyar*,[2] which was opposed to a long series of decisions of this Court."

On the merits, after reviewing the evidence, the learned Chief Justice came to the conclusion that the defendants had

1. (1919) L.R. 47 I A 76· I.L.R. 43 M. 567: 38 M L.J. 476 (P.C.).
2. (1913) 24 M.L.J. 571.

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failed to establish that they had any permanent right of occupancy in the lands in question, and summed up in the following words:—

"The question would rather appear to be: Did the landlord admit them in each case as tenants of the dry land on the terms that they were to have occupancy right for those dry lands if they brought them under well cultivation at their own expense, or was there a general custom in the estate that all tenants of dry lands who brought them under well cultivation should have occupancy right in them? Such a contract and custom were negatived in the case before the Privy Council. Neither is distinctly pleaded in the present case and I am not prepared to hold that they have been established by the evidence This conclusion appears to me to be in accordance with a long line of decisions of this Court and not to be inconsistent with the recent decision of the Privy Council"

Mr. Justice Sadasiva Aiyar examined the oral and documentary evidence in great detail and agreed with the conclusion of the Chief Justice.

Dunne, K.C. and *Raikes* for appellants.

De Gruyther, K C. and *Dube* for respondents.

19th March, 1929 Their Lordships' judgment was delivered by

Lord Salvesen.

LORD SALVESEN.—This is an appeal from a judgment and decree, dated the 15th October, 1920, of the High Court of Judicature at Madras, which varied a judgment and decree, dated 21st December, 1917, of the Subordinate Judge of Tinnevelly.

The appellants were defendants in a suit which was raised at the instance of the plaintiff-respondent for a partition of his one-half share of certain lands situate in the village of Ayyanarkulam in the Tinnevelly district and within an estate called Chinna Pannai. By alienations and purchases which are not now disputed, the first respondent is the owner of a one-half share of the Chinna Pannai estate, and the *ryotwari* settlement having been made by the Government with his predecessors-in-title, he is at present *ryotwari pattadar* of one-half undivided share of this estate. The earliest document of title is dated 1857 and refers back to a state of possession in 1851, but it is probable that the settlement took place at an earlier date. Even at that time the land was described as belonging to three classes: rain-fed lands, dry lands, and lands which were then irrigated by means of wells but had been formerly dry; and the wells were at least of two classes, *samudayam* wells—that is, wells common to the three *pannais*, of which the respondent now holds one-half share of the *chinna pannai* and other wells, some of which are probably named after persons through whom the appellants claim, and may be assum-

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ed to have been sunk by the cultivating occupiers. It appears also that palmyra trees had been planted, some by the owners and some by the cultivators. It is these lands, irrigated by wells, and the palmyras or garden lands, which alone are in dispute in the present suit, which is one for partition between the appellants and the said respondent of the properties comprised within the *chinna pannai* above referred to.

In the statement made on their behalf, the appellants admitted that the respondent's predecessors-in-title had been regularly receiving *tirwa swamibhogam* for his share of the lands. *Tirwa* is the share of the rents payable to Government, and *swamibhogam* the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax. In statement No. 11 they raised no objection to a division being effected in respect of the dry and rain-fed lands specified in Sch. III, but they maintained that the well-irrigated lands and palmyras should be excluded from the partition on the ground that they had acquired permanent rights of occupancy in the same, subject to the payment of a fixed rate of Rs. 4-6-0 for *punja* lands irrigated with water obtained from old wells, and Rs. 2-3-0 per acre for *punja* lands irrigated with water from new wells and pies four per palmyra. Some of these new wells, it appears from the evidence, were of comparatively recent date, but no distinction is made between the lands watered by these wells and those which were watered by wells of older date. In respect to all of them the appellants claimed that they were permanent tenants who had acquired by long occupation the *kudivaram* of these lands, subject only to the payment of a fixed annual return at the rates above mentioned.

The principle upon which disputes of this kind, which have frequently come before the Courts in India, fall to be decided, have now been conclusively fixed by two judgments of this Board. In the earlier of these, *Sethuratnam Aiyar* v. *Venkatachala Goundan*,[1] the long-contested dispute as to the burden of proof was dealt with in the judgment of the Board which was delivered by Sir Lawrence Jenkins:—

"The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves If this was not established then the defendants must fail, and, to adopt the language of section 101 of the Indian Evidence Act, as the defendants were bound to prove the existence of their per-

1. (1919) L.R. 47 I A. 76. I.L.R. 43 M. 567: 38 M L.J. 476 (P C).

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manent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognised in the series of Madras decisions cited in argument, and is, in their Lordships' opinion, not open to doubt"

In the latest case, *Nainapillai Marakayar* v. *Ramanathan Chettiar,*[3] this view was expressly re-affirmed.

The judgment of the Subordinate Judge in the present case is vitiated by the fact that he misapprehended the proper incidence of the burden of proof, his judgment having been delivered before the case in *Seturatnam Aiyar* v. *Venkatachala Goundan*[1] above referred to had been decided in the Privy Council.

The question, then, in the present case is whether on the evidence the appellants have established the permanent occupancy rights which they claim. In the case in *Seturatnam Aiyar* v. *Venkatachala Goundan,*[1] the High Court had held that the appellants in that case had satisfied the onus of proof which in the first instance lay upon them, and their Lordships of the Privy Council saw no reason to disturb the inference which they had drawn from the facts proved. A similar result was arrived at in the case of *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi,*[4] but in the case reported in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[3] the inference from the facts there proved was to the opposite effect. In the present case the Judges of the High Court have very carefully examined all the evidence and have reached a result unfavourable to the appellants. It would serve little purpose to go through the evidence which has already been dealt with in detail by these learned Judges, seeing that the accuracy of their statement of facts and the soundness of their reasoning has not been successfully criticised. It is sufficient to point out that the facts in the other two cases, *Seturatnam Aiyar* v. *Venkatachala Goundan*[1] and *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi,*[4] were very different from those which the appellants have been able to prove here. In the former case it was found to be established as a fact that the possession of the occupancy tenants had been immemorial and, what is perhaps more important, that at the inception of the relations between the owner and the tenants, the latter had possessed occupancy rights. In the latter case the tenants succeeded in showing that they had been dealing with the property as their own for at

1 (1919) L.R 47 I A 76: I.L R 43 M. 567: 38 M.L.J. 476 (P.C.).
3 (1923) L.R 51 I.A. 83: I L R. 47 M 337: 46 M.L.J. 546 (P C).
4. (1922) L.R. 49 I.A. 286 I.L.R. 45 M 586: 43 M.L.J. 640 (P C.).

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least a hundred years. They had also shown that they had received compensation from the Government for lands taken out of their holdings for public purposes and that the plaintiff's evidence had been found to be mostly false and fabricated. No such facts have been established in the present case. To use the language of Sri Lawrence Jenkins,

"permanence is not a universal and integral incident of an under-ryot's holding. If claimed, it must be established This may be done by proving custom, contract or a title, and possibly by other means"

In the present case the appellants have succeeded in showing little else than that they have remained in undisturbed possession of some of the land in question for a long period at a more or less uniform rent, but they have not attempted to prove any custom upon which they could found, and the attempt which they made to prove a contract with regard to the lands in which new wells were sunk, under which they were to be allowed to occupy these on a reduced rate of rent as compared with the lands on which the old wells were situate, has completely failed. The alienations on which they found and which, if they had been made over a long period, would have been valuable evidence in establishing the right which they claim, all turn out to be of comparatively recent date, and not of such a kind as would ordinarily be brought to the notice of the *pattadar*, for they do not seem in most cases to have involved any change of tenancy.

There is also one point on which one of the learned Judges of the High Court relies, and which does not appear to have been present in any of the previous cases, namely, that in the half of the *chinna pannai* which is not claimed by the respondent some of the appellants actually acquired the *kudivaram* of the land. This, while not conclusive, as it might have been done by way of excessive caution, militates against the claim which they are now making. A cultivator who has acquired permanent rights of occupancy may purchase the *melvaram* of the lands so as to become the absolute proprietor, but if he considers himself to be the owner of the *kudivaram* it is not likely that he would expressly purchase the latter without some indication that he was only doing so to avoid disputes. The present suit is not an action of ejection, but is brought to establish that the plaintiff-respondent is entitled to have all the lands within his title partitioned on the footing that the appellants as a community of cultivators have not acquired the permanent rights of occupancy which they claim. Their Lordships express no opinion as to the terms on which ejection of any individual occupier may be sanctioned by the Court if and when such a suit is brought.

Their Lordships have therefore come to the conclusion not merely that there are no sufficient grounds for disturbing the inferences which the High Court have drawn from the facts proved before them, but they agree with them that these were the proper inferences to be drawn.

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They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Douglas Grant & Dold.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD SHAW, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Ram Sunder Lal and another .. *Appellants** (*Defts.*)

v.

Lachhmi Narain and another .. *Respondents* (*Plffs.*).

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Ram Sunder Lal v. Lachhmi Narain.

Hindu Law—Joint family—Father—Sale by—Son's suit to set aside, and to recover property sold—Decree in—Form of—Sale for necessity and for adequate consideration and effected after due inquiry by vendee—Portion of purchase money—Application of—Purchaser's failure to account for—Effect

Plaintiffs, the minor sons of one *N*, deceased, instituted a suit on 2nd March, 1922, to recover possession of certain property, and for a declaration that a certain sale-deed, dated 21st July, 1908, purporting to have been executed by *N* in favour of an ancestor of the defendants was invalid

The facts found were that the sale of 21st July, 1908 was effected after due inquiry made by or on behalf of the vendee as to the legal necessity, that the sale was for adequate consideration, that legal necessity was proved by the defendants to the extent of Rs 7,744 at least out of a total price of Rs 10,767, and that they were not able to prove how the surplus was applied

The Subordinate Judge made a decree dismissing the plaintiffs' claim but directing the defendants to pay to the plaintiffs the sum representing the unaccounted surplus

On appeal, the High Court set aside the decree of the Sub-Judge and decreed possession of the suit property to the plaintiffs subject to the payment by them within a period fixed of the sum of Rs 7,744 The decree further provided that in case of non-payment by them within the time mentioned the suit should stand dismissed.

Held, that neither of the decrees below could stand, and that the proper decree to be passed in the case was one dismissing the suit. The material question in the case is whether the sale itself was one which was

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*P.C. Appeal No 46 of 1928 15th March, 1929.
Allahabad Appeal No. 24 of 1926.

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justified by legal necessity. Even assuming that the defendants after a long interval of time were not able to prove conclusively how the surplus was applied, that fact alone is not sufficient ground for setting aside the sale.

Appeal No. 46 of 1928 from a decree of the High Court, Allahabad (Kanhaiya Lal and Ashworth, JJ.), dated the 6th July, 1926, modifying a decree of the Subordinate Judge of Ghazipur, dated the 7th April, 1923.

The material facts of the case appear sufficiently in their Lordships' judgment.

W. Wallach for appellants.

The respondents were not represented.

15th March, 1929. The judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the defendants in the suit against a decree of the High Court of Judicature at Allahabad, dated the 6th July, 1926, whereby a decree of the Subordinate Judge of Ghazipur, dated the 7th April, 1923, was modified.

The suit was brought on the 2nd March, 1922, by the plaintiffs, the minor sons of one Sat Narain Pande, who died in 1915, by their mother, Musammat Narain Kunwar, their certificated guardian, against the defendants, to recover possession of the property specified in the plaint, *viz.*, Mauza Kanauli and Mauza Sikandra, and for a declaration that a certain sale-deed dated the 21st July, 1908, purporting to have been executed by Sat Narain Pande, the father of the plaintiffs, in favour of one Misri Lal, the ancestor of the defendants, was invalid.

It was alleged by the plaintiffs that their father was a notorious debauchee and had squandered the joint family property in meeting the expenses of his debauchery and immoral habits; that the above-mentioned sale-deed was executed without any valid necessity and any legal antecedent debt and without any consideration by inserting wrong and fictitious debts and necessities therein.

The defence was to the effect that the property in suit had been sold for legal necessity for the benefit of the family for payment of antecedent debts, and for full consideration.

The learned Subordinate Judge found that, though the father of the plaintiffs was at one time addicted to immoral habits, he had reformed himself long before the transaction which was impeached in the suit and that the sale of the property

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was made for valid consideration and for the payment of pre-existing debts, except to the extent of Rs. 2,550.

The learned Judge made a decree that the plaintiffs' claim should be dismissed but that the defendants should pay within two months the sum of Rs. 2,550 to the plaintiffs and the third son of Sat Narain Pande, who was not a party to the suit. The plaintiffs appealed to the High Court, and the defendants filed a cross-objection.

The learned Judges, on appeal, agreed with the finding of the learned Subordinate Judge as to the allegations of debauchery on the part of Sat Narain Pande, and held that there was considerable evidence to show that Sat Narain Pande had at one time been addicted to immoral habits, but that he had reformed himself and that about 20 or 22 years before the trial of the suit he had married Musammat Narain Kunwar, the mother of the plaintiffs, with whom he lived amicably until his death in 1915, and by whom he had three sons and a daughter born to him. They further held that there was no satisfactory evidence that at the time the mortgages and the sale, referred to in their judgment, were effected he had applied the moneys taken in respect thereof to immoral purposes. There are therefore concurrent findings of fact on this part of the case which their Lordships see no reason for disturbing.

The learned Judges examined the evidence relating to the issue as to legal necessity and came to the conclusion that it had been proved that Rs. 7,744-8-0 represented debts due by Sat Narain Pande to third persons for which the plaintiffs were legitimately liable; that the plaintiffs were not liable for the remainder of the consideration specified in the sale-deed, the total of which was Rs. 10,767-7-0.

The learned Judges allowed the appeal, set aside the decree of the learned Subordinate Judge and made a decree in favour of the plaintiffs for possession of the disputed property subject to the payment by the plaintiffs within four months of the sum of Rs. 7,744-8-0. It was further ordered that in case of non-payment of the said money within the time mentioned the suit should stand dismissed. The cross-objection which had been filed by the defendants against the order of the learned Subordinate Judge directing them to pay to the plaintiffs and their brother the sum of Rs. 2,500, was disallowed.

The defendants appealed against the said decree of the High Court and they appeared by learned Counsel at the hearing before the Board. The plaintiff-respondents however did not

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file any case, and they were not represented at the hearing of the appeal.

Their Lordships are not able to uphold either of the decrees made by the Courts in India.

Both the decrees, in their Lordships' opinion, are inconsistent with the principles laid down by the Judicial Committee in several cases, *e.g.*, *Hunoomanpersaud Panday* v. *Munraj Koonweree*,[1] *Masit Ullah* v. *Damodar Prasad*[2] and *Krishn Das* v. *Nathu Ram*.[3]

The judgment of the High Court in the present case was delivered on the 6th July, 1926, and in making the decree that the plaintiffs should recover possession of the property upon the payment of Rs. 7,744-8-0 within four months, the learned Judges apparently were following the form of decree which had been adopted by the Allahabad High Court in previous cases, *e.g.*, *Gobind Singh* v. *Baldeo Singh*,[4] *Ram Dei Kunwar* v. *Abu Jafar*[5] and *Dwarka Ram* v. *Jhulai Pande*.[6]

In the last-mentioned case the ground of the judgment of the High Court was as follows:—

> "If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should therefore be a decree for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family"

The decision of the Judicial Committee in the abovementioned case of *Krishn Das* v. *Nathu Ram*[3] was given in December, 1926, some five months after the judgment of the Allahabad High Court which is now under consideration. In the last cited case their Lordships of the Judicial Committee disapproved of the above-mentioned decisions of the Allahabad High Court in *Gobind Singh* v. *Baldeo Singh*,[4] *Ram Dei Kunwar* v. *Abu Jafar*[5] and *Dwarka Ram* v. *Jhulai Pande*[6] and of another decision of the same Court in *Daulat* v. *Sankatha Prasad*.[7]

Their Lordships pointed out that the decisions, of which they disapproved, were inconsistent with the principles which had been laid down in a series of cases by the Judicial Committee and which had been followed by the Courts in India, except in Allahabad.

1. (1856) 6 M.I.A. 393
2. (1926) L.R. 53 I.A. 204: I.L.R. 48 A. 518: 51 M.L.J. 792 (P.C.).
3. (1926) L.R. 54 I.A. 79: I.L.R. 49 A. 149: 52 M.L.J. 720 (P.C.).
4. (1903) I.L.R. 25 A. 330.
5. (1905) I.L.R. 27 A. 494.
6. (1923) I.L.R. 45 A. 429.
7. (1924) I.L.R. 47 A. 355.

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Their Lordships referred to the judgment in the well-known case of *Hunoomanpersaud Panday* v. *Musummat Babroje Munraj Koonweree*[1] for the purpose of stating the principle on which cases such as this should be decided, and then proceeded as follows:—

> "Where the purchaser acts in good faith and after due enquiry and is able to show that the sale itself was justified by legal necessity he is under no obligation to enquire into the application of any surplus and is therefore not bound to make repayment of such surplus to the members of the family challenging the sale."

It appears clear therefore that in view of the above-mentioned decisions of the Judicial Committee neither of the two decrees made in this case in India can stand.

It remains to be considered whether the defendants are entitled, as they contend, to succeed in their appeal and to have the plaintiffs' suit dismissed.

The material question is whether the sale itself was one which was justified by legal necessity. The property in dispute, *viz.*, the villages of Sikandra and Kanauli, was sold by the deed of 21st July, 1908, by Sat Narain Pande, acting for himself and his minor sons, to Misri Lal, the ancestor of the defendants, for Rs. 10,767-7-0. The property in suit and certain lands in Basupur had been mortgaged to Misri Lal, and by reason of the sale the entire debts were discharged, and a sum of Rs. 885 was paid in cash to Sat Narain Pande. By reason of the sale the lands in Basupur were released from mortgage and were saved to the estate.

The learned Subordinate Judge, as already stated, held that the major portion of the consideration went to discharge old debts in respect of money borrowed for legal necessity. He held that the defendants had failed to prove that the sum of Rs. 2,498, part of the consideration for the sale, was paid to the plaintiffs' father for legal necessity, but that the rest of the sale "consideration has been proved to have been advanced for satisfaction of debts borrowed for legal necessities."

The learned Judges of the High Court agreed that there were debts due by Sat Narain Pande which were properly credited in the account of the consideration specified in the sale-deed to the extent of Rs. 7,744-8-0. The learned Judges, however, held that the defendants had not proved legal necessity in respect of the balance, though one of the learned Judges expressed a doubt as to two items, *viz.*, Rs. 113 and Rs. 418.

1. (1856) 6 M.I.A. 393.

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The above-mentioned balance of the consideration money disallowed by the learned Judges of the High Court was in respect of sums alleged to have been advanced at various times for the purpose of paying Government revenue and meeting other expenses. Some of the items were specifically mentioned in mortgages effected in 1904, 1905 and 1907, and one item was in respect of cash alleged to have been paid at the time the sale was effected in July, 1908, for the purpose of paying Government revenue and meeting other family necessities. This suit was brought by the plaintiffs in March, 1922, nearly 14 years after the sale was effected, and when even a longer period had elapsed since some of the advances now questioned were made.

Although there was some evidence, in addition to the recitals in the various documents, that the sums were required for the above-mentioned purposes, it may have been and probably was difficult for the defendants to prove conclusively the manner in which the sums making up the balance, which was disallowed by the Courts in India, were utilised.

The material question, however, is whether the sale itself was one which was justified by legal necessity. There is no doubt that out of the total price, *viz.*, Rs. 10,767, the sum of Rs. 7,744 at least was used for paying debts incurred by Sat Narain Pande for legal necessity. Their Lordships further are satisfied that due enquiries as to the necessity were made by or on behalf of Misri Lal, the purchaser, before the advances were made and the sale was effected.

There remains the question whether the consideration was adequate. There is but little evidence as to the value of the property at the time of the sale. The learned Subordinate Judge, acting on the evidence of a man who had been patwari of the villages since 1916 found the property to be worth Rs. 16,000 which their Lordships understand to be his estimate of the value of the property at the time of the trial in 1923. The learned Judge stated that the patwari admitted that the income had increased since the sale to the ancestor of the defendants in 1908. To what extent the property had increased in value is not evident.

In view of the facts of this case and the finding of the learned Subordinate Judge, their Lordships are unable to hold that the price obtained for the property in 1908 was inadequate.

Their Lordships therefore are of opinion that it must be taken on the facts of this case that the sale of the 21st July,

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1908, was effected after due enquiry made by or on behalf of the vendee as to the legal necessity, that the sale was for adequate consideration, that legal necessity was proved by the defendants to the extent of Rs. 7,744 at least out of a total price of Rs. 10,767, and that even assuming that the defendants after a long interval of time were not able to prove conclusively how the surplus was applied by Misri Lal, that fact alone is not sufficient ground for setting aside the sale.

For these reasons their Lordships are of opinion that the appeal should be allowed, that the decrees of the High Court and of the Subordinate Judge should be set aside, that the plaintiffs' suit should be dismissed and that the plaintiffs should pay the defendants' costs of this appeal and of the proceedings in both Courts in India, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

K.J.R. ——— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Board of Revenue for the United Provinces of Agra and Oudh.]

PRESENT:—LORD PHILLIMORE, LORD ATKIN, LORD SALVESEN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Raja Udit Narain Singh, since deceased (now represented by Raja Harnam Singh) .. *Appellant**

v.

Shaikh Mubarak Ali and others .. *Respondents.*

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United Provinces Land Revenue Act (III of 1901), S. 32, cl (a)—Register maintained under—Entries in—Dispute as to—Decision of—Mode of—Order of Board of Revenue in—Appeal to Privy Council from—Competency of—Ss 40, 42 of Act—Applicability and effect of—S 32 (e)—Register maintained under—Entry in—Dispute as to—Decision of—Appeal to Privy Council in case of—Right of

The first respondent, a thekadar registered under the United Provinces Land Revenue Act, 1901, purported to transfer his theka or lease to the second and third respondents The second and third respondents then applied for mutation of names On notice of that application being given to the appellant as the superior proprietor, he objected that the theka had been forfeited by the transfer, that the transferees were at most mere tenants, and that they were not entitled to be entered either as thekadars or as matahatdhars The Assistant Collector upheld that contention and directed the second and third respondents to be registered as tenants. The first respondent thereupon sued the second and third respondents in the Civil Court and obtained a decree by consent declaring that his gift to them was incomplete and that no title passed He then appealed to the

*P.C Appeal No. 140 of 1927 17th December, 1928.

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Deputy Commissioner, who ordered the second and third respondents to be registered as thekadars That order, on appeal by the appellant, was reversed by the Commissioner, who restored the order of the Assistant Collector. On appeal by the first respondent from that order by the Commissioner, the Board of Revenue, after making the second and third respondents parties in the appeal to it, held that the transfer in their favour was invalid and directed that the name of the 1st respondent should again be entered as thekadar. On appeal to His Majesty in Council from that order of the Board of Revenue, *held* that the appellant had no right of appeal to His Majesty in Council.

The dispute was about an entry in the register maintained under cl (*a*) and not under cl (*e*) of S 32 of the Land Revenue Act, and disputes about entries in register maintained under cl. (*a*) are to be decided, not in accordance with the provisions of S 42, but in accordance with the provisions of S. 40 of the Act, which does not make any of the provisions of the Civil Procedure Code applicable.

Quaere: Whether S 42 (which applied the provisions of Civil Procedure Code to the trial of particular disputes as to certain entries to be made in the register maintained under clause (*e*) of S 32 of the Act) merely directs the Collector in the trial of the dispute to observe the provisions of the Civil Procedure Code, and does not provide that that procedure should be observed as to appeals from his order

Appeal No. 140 of 1927 from an order, dated the 9th December 1925, of the Board of Revenue of the United Provinces of Agra and Oudh, reversing an order, dated the 21st April, 1925, of the Commissioner, Fyzabad Division.

In the course of their order, dated the 13th August, 1926, granting leave to appeal to His Majesty in Council, the Board of Revenue observed as follows:—

"This is an important case and it will be noted that important points of law are involved and that the order of the trial court was reversed by the Deputy Commissioner. The Commissioner restored the order of the trial Court and this Court reversed the order of the Commissioner It is argued for the opposite party that the original case being under section 42 of the Land Revenue Act, the Civil Procedure Code does not apply, as the Land Revenue Act is complete in itself and therefore there is no appeal at all to the Privy Council The learned counsel admits that this is not the case as regards the Oudh Rent Act but he states that why there is a right of appeal to the Privy Council under that Act is because under section 135 the provisions of the Civil Procedure Code expressly apply to the Act so far as they are not inconsistent with its provisions But this seems to me to confound procedure with substantive rights In this very case the right of appeal to the Privy Council in all cases is governed by the provisions of sections 109 and 110, Civil Procedure Code, but the procedure is governed by the rules under Order 45 of the same Code I hold that sections 109 and 110 govern all rights of appeal to the Privy Council and if this particular case falls within the provisions of these sections there is undoubtedly a right of appeal to the Privy Council. The case certainly falls within these sections The land revenue on the property in suit is over Rs 2,000 which makes the valuation well over Rs 10,000, at even 20 years' purchase, the ordinary rule of valuation. I hold therefore that this appeal lies under the provisions of section 109, Civil Procedure Code, read with section 110, Civil Procedure Code, first clause."

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Raja Udit Narain Singh *v.* Shaikh Mubarak Ali.

The facts of the case, as well as the substance of the relevant sections of the United Provinces Land Revenue Act, 1901, are fully set out in their Lordships' judgment.

De Gruyther, K.C. and *Raikes* for appellant.

Dunne, K.C. and *Jopling* for respondents.

Dunne, K.C., raised a preliminary objection that the appeal to the Privy Council was not competent.

See the United Provinces Land Revenue Act, III of 1901, section 32 (*a*).

[*Lord Phillimore* refers to the order of the Board of Revenue granting leave to appeal, and points out that they state that the case was under section 42 of the Land Revenue Act.]

Section 42 is obviously a mistake for section 40.

[*Sir John Wallis.*—The Board of Revenue rely on S. 135 of the Oudh Rent Act, which makes the provisions of the Civil Procedure Code expressly applicable to the Land Revenue Act so far as they are not inconsistent with its provisions.]

[*Sir John Wallis.*—Unless there is some express provision of the law making the provisions of the Civil Procedure Code as regards appeals to the Privy Council applicable to proceedings under the Revenue Act, those provisions of the Civil Procedure Code cannot apply. There must be some express statutory provision making them applicable.]

[*Sir Lancelot Sanderson.*—The appellant can only come in, if at all, under section 109, clause (*c*) of the Civil Procedure Code.]

[*Sir John Wallis.*—Section 109 of the Civil Procedure Code does not apply to Revenue Courts at all.]

[*Sir Lancelot Sanderson.*—Does clause (*c*) of section 109 apply only to High Courts, or also to Revenue Courts?]

[*Lord Phillimore.*—I gather from the order granting leave that the Oudh Rent Act gives a right of appeal which does not otherwise exist.]

I submit that it would be monstrous that in such summary cases there should be a right of appeal to the Privy Council.

[*Lord Phillimore.*—Is it not equally monstrous that there should be an appeal to the Board of Revenue?]

Unless there is some statutory authority, there is no appeal to the Privy Council.

[*Lord Atkin.*—*See* Ss. 210 and 212 of the Land Revenue Act; section 210 gives a right of appeal from one Court to another, and section 212 provides for a second appeal.]

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[*Sir John Wallis.*—There is a third appeal under section 213 to the Board of Revenue.]

[*Lord Salvesen.*—Is not this Act (the Land Revenue Act) exhaustive of all the right of appeal?]

[*Lord Salvesen.*—Is this the first occasion in which the jurisdiction of the Privy Council is invoked?]

Yes.

[*Lord Phillimore.*—You must admit, Mr. Dunne, that there are certain cases in which appeals from the Board of Revenue lie to the Privy Council. Under what provisions would they come in?]

They would be under the Civil Procedure Code.

[*Lord Phillimore* refers to *Rani Bijai Raj Kunwar* v. *Jai Indar Bahadur Singh.*[1]]

[*Sir Lancelot Sanderson.*—Was the question raised in that case whether or not there was a right of appeal to the Privy Council?]

[*Lord Phillimore.*—Sir John Edge wrote the judgment there.]

It was a case under the Oudh Rent Act.

[*Lord Salvesen.*—The competency of appeal in that case was apparently not raised.]

My submission is that the Land Revenue Act is exhaustive and self-contained, and contains express provisions for appeals up to the Board of Revenue, but no provisions for appeals from the Board of Revenue. I rely on Lord Macnaghten's judgment in *Rangoon Botatoung Co., Ltd.* v. *The Collector, Rangoon,*[2] a case under the Land Acquisition Act. His Lordship says that there must be a statutory enactment to confer a right of appeal. The Legislature had to pass a special Act later on, making appeals possible in such cases. I also rely on *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay,*[3] a decision under the Income-tax Act. Here also it was likewise held that in the absence of statutory authority an appeal to the Privy Council was not competent, and the Legislature afterwards amended the Act so as to confer an express right of appeal.

[*Lord Atkin.*—In these summary proceedings under the Land Revenue Act, the question simply is, whether A or B is

1 (1922) L R. 49 I.A. 262: I.L.R. 44 A. 435: 43 M.L.J. 682 (P.C)
2. (1912) L.R. 39 I.A. 197: I.L.R. 40 C. 21: 23 M.L.J. 276 (P.C).
3. (1923) L.R. 50 I.A. 212: I.L.R. 47 B. 724: 45 M.L.J. 295 (P.C).

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prima facie in possession. Suppose after the decision of the Board of Revenue, we decide the question, the aggrieved party starts right away with a suit in India for a declaration that the decision of the Privy Council as to *prima facie* possession was wrong, and the case again comes up ultimately before the Privy Council. That would rather be a startling procedure.]

[*Lord Phillimore*.—I have recollection we have heard appeals from Baluchistan, where the Civil Procedure Code did not apply.]

Jopling followed.

De Gruyther, K.C., in reply to the preliminary objection.

By virtue of the Oudh Rent Act, the provisions of the Civil Procedure Code are applicable, and therefore there is an appeal to the Privy Council.

[*Lord Phillimore* refers to *Rani Bijai Raj Kunwar* v. *Jai Indar Bahadur Singh*[1] and *Parbati Kunwar* v. *Deputy Commissioner of Kheri*.[4]]

See also *Bishun Nath Saran Singh* v. *Shankar Bahadur Singh*,[5] a decision of the Board of Revenue.

Reference was made to *Maheshar Parshad* v. *Muhammad Ewaz Ali Khan*[6] as to the respective jurisdiction of the Civil and Revenue Courts.

17th December, 1928. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—In this case the Board of Revenue of the United Provinces granted Raja Udit Narain Singh, since deceased, who will be referred to as the appellant, leave to appeal to His Majesty in Council from their order directing that the first respondent, Shaikh Mubarak Ali, should be re-entered on the register maintained by the Revenue authorities under the United Provinces Land Revenue Act III of 1901, as a thekadar or holder of a permanent but not transferable lease in a village of which the appellant was the proprietor.

The first respondent had purported to transfer his theka or lease to his son and grandson, the second and third respondents, with the object, it was alleged, of defeating the rights of succes-

1 (1922) L R. 49 I A. 262: I.L R. 44 A 435: 43 M.L.J. 682 (P.C).
4 (1918) L.R. 45 I.A. 111. I.L.R. 40 A. 541 35 M.L.J. 525 (P.C).
5. (1924) 11 O.L.J. 687.
6. (1909) L.R. 36 I.A. 114: I.L.R. 31 A. 394: 19 M.L.J. 442 (P.C).

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sion of his other heirs under the Muhammadan Law. On their application for mutation of names they were erroneously entered as pukhtadari tenants, a term applicable to tenants holding under a sub-settlement. They then applied that they might be entered as matahatdars, a description applicable to under-proprietors or persons holding a heritable and transferable right in the land as defined in clause (15) of section 4 of the United Provinces Land Revenue Act III of 1901. The revenue authorities corrected the register but entered them as thekadars, the description under which their transferor, the first respondent, had been entered.

They then applied to the Assistant Collector who ordered notice to go to the appellant as the superior proprietor. The appellant appeared and objected that the permanent lease had been forfeited by the transfer and that the transferees were at most mere tenants. The Assistant Collector upheld this contention and directed them to be registered as tenants (which, as will be seen, means tenants of the lands actually cultivated or otherwise occupied by them), that is to say, he upheld the appellant's contention that the theka had been forfeited and that they were not entitled to be entered either as thekadars or as matahatdars.

The first respondent thereupon sued the second and third respondents for a declaration that his gift to them was incomplete and no title had passed, and obtained a decree by consent. He then appealed to the Deputy Commissioner who ordered the second and third respondents to be registered as thekadars This order, on appeal by the appellant here, was reversed by the Commissioner, who restored the order of the Assistant Collector. The first respondent then appealed to the Board of Revenue, who, after making the second and third respondents, parties here, respondents in that appeal, held that transfer in their favour was invalid and directed that the name of the first respondent should again be entered as thekadar. It was from this order that the appellant obtained leave to appeal to His Majesty in Council.

At the hearing before their Lordships, Mr. Dunne took a preliminary objection that no appeal lay, and Mr. de Gruyther, for the appellant, contended that the order under appeal had been made in the course of an inquiry as to "a dispute respecting the class or tenure of any tenant" within the meaning of section 42 of the Land Revenue Act, as to which it is provided that the Collector in the trial of the dispute is to observe the proce-

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dure prescribed for cases of a similar kind for the trial of suits under the Oudh Rent Act III of 1886. As by section 135 of the Oudh Rent Act, save as otherwise provided, the provisions of the Code of Civil Procedure are applied to all suits and proceedings under that Act, Mr. de Gruyther contended that the provisions of the Code as to granting leave to appeal to His Majesty's Council were applicable to the present case. For the respondents it was contended that section 42 was not applicable, and, even if it were, it merely directed the Collector in the trial of the dispute to observe the provisions of the Civil Procedure Code, and did not provide that that procedure should be observed as to appeals from his order.

It is unnecessary to deal with the latter contention because, in their Lordships' opinion, the dispute was about an entry in the register maintained under clause (*a*) and not under cl. (*e*) of section 32, and because disputes about entries in register maintained under clause (*a*) are to be decided, not in accordance with the provisions of section 42, but in accordance with the provisions of section 40, which does not make any of the provisions of the Civil Procedure Code applicable

These sections are to be found in Chapter III of the Land Revenue Act, "*Maintenance of Maps and Registers,*" and come under the sub-heading "*Registers.*" Section 31 requires lists to be prepared and maintained of all revenue-paying mahals, or revenue divisions, specifying the revenue assessed and the person by whom it is payable, and also of all revenue-free mahals. Then comes section 32, which provides that for every mahal or village in a mahal there is to be a record-of-rights, which is to include the following registers:—

(*a*) a register of all the proprietors in the mahal, including the proprietors of specific areas, specifying the nature and extent of the interest of each;

(*b*) in Oudh, for all mahals or pattis held in sub-settlement or under a heritable non-transferable lease, the rent payable under which has been fixed by the Settlement Officer or other competent authority, a register of all the under-proprietary co-sharers or co-lessees, specifying the nature and extent of the interest of each of them.

(*c*) in Oudh, a register of all other under-proprietors in a mahal, and all other lessees whose rents have been fixed by a Settlement Officer, or other competent authority, specifying the nature and extent of the interest of each of them;

(*d*) a register of all persons holding land revenue free, specifying the nature and extent of the interest of each,

(*e*) a register of all persons cultivating or otherwise occupying land specifying the particulars required by section 55.

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Explanation—In this section the words "proprietor" and "under-proprietor" include a person in possession of proprietary or under-proprietary rights under a mortgage or lease.

Now a thekadar, who is referred to in section 3, clause (10) of the Oudh Rent Act as "a person to whom the collection of rents in a village or portion of a village has been leased by the landlord" is clearly a person in possession of proprietary rights under a lease within the meaning of the explanation, and so to be entered in the register of proprietors under (*a*); and it is also clear that the dispute between the appellant the proprietor and the respondents was, whether after the transfer by the first respondent to the second and third respondents the theka had not been forfeited so that neither the first respondent, the transferor nor the second and third respondents were entitled to be entered in that register.

It is also clear that merely as thekadars they would not be entered in register (*e*) as contended for the appellant. S. 55 provides that the register maintained under (*e*) shall specify as to each tenant the nature and class of his tenure as determined by the Oudh Rent Act and the rent payable by the tenant, and shall also specify the proprietors or under-proprietors (if any) holding land as *sir* (or home farm land), or cultivating land, not being *sir*, otherwise than as tenants, and stating with regard to the latter class of lands the number of completed years during which they have been so cultivated. It is clear, therefore, that proprietors and under-proprietors and those claiming under them by lease or mortgage are not to be entered in this register, except in so far as they themselves actually occupy or cultivate land in the village, and that it cannot otherwise include persons in possession of proprietary rights under a mortgage or lease such as a thekadar.

It has next to be considered how disputes as to entries in register (*a*) are to be decided. Section 33 requires the Collector to record in the registers all changes that may take place and any transaction that may affect any of the rights and interests recorded. And under section 34 every person obtaining possession by transfer of any proprietary right in a mahal, or part of a mahal, or the profits thereof, or in any specific area therein, which is required to be recorded in registers (*a*) to (*d*) of section 32 is required to report the transfer, and no Revenue Court is to entertain a suit or application by him until he has done so. If there is a dispute about the transfer section 35 requires the Tahsildar to refer the case to the Collector, who is to dispose

of it after deciding the dispute in accordance with the provisions of section 40.

Section 40 provides that all disputes as to entries in the annual registers are to be decided on the basis of possession, and if the Collector cannot satisfy himself as to which party is in possession, he is to ascertain by summary inquiry who is the person best entitled to the property and shall put such person in possession, but no order as to possession under this section is to bar anybody from establishing his right to the property in any Civil Court; and it is further provided by section 44, that no entry or decision under section 40 is to affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers (*a*) to (*d*) of section 32.

It is in their Lordships' opinion clear that all the Collector could do besides amending the register after the summary inquiry under section 40 was to put the successful party into possession, and that his order would not debar the unsuccessful party from asserting his rights by suit in a Civil Court. It is therefore not surprising that there is no provision of law making the summary inquiry under section 40 subject to the Civil Procedure Code so as to render the order made by the Board of Revenue in such an inquiry appealable to His Majesty in Council.

In this view it is unnecessary to consider the effect of the provisions of section 42, which applies the provisions of the Civil Procedure Code to the trial of particular disputes as to certain entries to be made in the register maintained under clause (*e*)—apparently because under section 44 the decision is to be binding on Revenue Courts which have exclusive jurisdiction in suits relating to the same matter.

In their Lordships' opinion the appellant has failed to show any right to appeal to His Majesty in Council, and the appeal should be dismissed with costs, save only that the costs of preparing and lodging the respondents' case must be borne by the respondents themselves, as the objection was only taken at the hearing. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Guruswami Pillai and another .. *Appellants**

v.

Virabhadra Tavulkaran and another .. *Respondents.*

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Letters Patent (as amended)—Cl (36)—Applicability of, to pending cases

Clause (36) of the Letters Patent as amended applies to all pending cases.

Appeal under clause (15) of the Letters Patent against the judgment of the Honourable Mr. Justice Odgers, dated 13th March, 1925 and passed in S.A. No. 453 of 1922 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tanjore in A.S. No. 25 of 1921 (O.S. No. 34 of 1917, District Munsif's Court. Tiruvadi).

A. Krishnaswami Aiyar and *K. Balasubrahmanya Aiyar* for appellants

K. V. Krishnaswami Aiyar and *V. Sundaram Aiyar* for respondents.

The Court (Jackson and Thiruvenkatachariar, JJ.) made the following

ORDER.—Before deciding this case it is necessary to call for a finding from the Lower Appellate Court on the third issue drafted in the remand judgment of 20th January, 1919, *viz.*, "whether the defendants failed to render services of periamelam and chinnamelam to the temple mentioned in the plaint even after the receipt of their emoluments due to their offices"?

The Subordinate Judge of Tanjore will submit a finding on the aforesaid issue within one month from the date of this order, and ten days are allowed for filing objections to the said finding.

In compliance with the above order the Subordinate Judge of Tanjore submitted the following

FINDING.—I hold that the defendants were not prevented from doing service by the plaintiffs but they wilfully ceased to render service and I find the issue in the affirmative.

A. Krishnaswami Aiyar and *K. Balasubrahmanya Aiyar* for appellants.

V. Sundaram Aiyar for respondents.

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*L P A No 202 of 1925. 26th February, 1929.

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Jackson, J.

The Court (Jackson and Thiruvenkatachariar, JJ.) delivered the following

JUDGMENTS. *Jackson, J.*—Plaintiffs, the trustees of a Hindu temple, sued defendants, professional drummers, in ejectment. They alleged that in 1880 the trustees by oral agreement allowed defendants to live in a terraced house belonging to the temple rent free on condition of playing their drums in the temple. They had ceased playing and should be made to deliver over the house.

The defendants stated that there was no oral agreement but a registered one under which the trustees granted the defendants, in return for their service, the house-site and superstructure, and the produce of a fourth share in the village. The terraced and a thatched house were erected by themselves.

The plaintiffs then gave up their attempt to pretend that the superstructures belonged to the temple, endorsing on the plaint that the claim was abandoned. Whereupon the District Munsif summarily disposed of the suit on the pleadings, giving the plaintiffs the site of the buildings, which he allowed the defendants to remove.

The defendants appealed, and the Subordinate Judge found that the oral agreement set up in the plaint was no more valid than the claim to the houses, but he rehabilitated the suit on the defendants' document Exhibit I, and on the fiction that plaintiffs were suing defendants for contravening its provisions, he remanded the suit for further trial upon three new issues: whether plaintiffs possessed the lands appertaining to defendants' fourth share with defendants' consent, whether plaintiffs paid the emoluments due to defendants until the defendants failed to render service, and whether after receipt of these emoluments defendants failed to render service. These are all questions of fact, and it has now been found that plaintiffs possessed the land with defendants' consent, that admittedly the plaintiffs are not giving the defendants the entire income of the lands, and defendants wilfully ceased to render service. The last finding was not originally recorded in the Lower Appellate Court. The learned Subordinate Judge confined himself to finding:

"So long as the plaintiffs have not established that they have as provided for in Exhibit I, paid to the defendants the entire income of the quarter *pangu* of lands, they are not entitled to find fault with them for failure to perform services."

He gave no finding upon issue 3 which was obtained by ourselves at the plaintiffs' request, because when the Second

Appeal was heard by Odgers, J, he observed that there was no finding that the default was wilful, and rather seemed to assume the negative.

Now that we have got this finding, I do not think it betters the plaintiffs' case. If they refuse to pay defendants the entire income stipulated in Exhibit I they cannot complain of default in service. They seem to have realised that under Exhibit I they had no case, else they would not have elected to sue upon false pleas. As the learned Subordinate Judge observes there is a *bona fide* dispute between the parties over the amount to be paid; and, until that is settled, plaintiffs cannot claim a preference, saying that however much the remuneration may be withheld, the drumming must never be interrupted.

I do not think that we can reopen the second issue at this stage nor was it ever suggested when we were asked to send down for a finding upon issue 3. And I do not see how, if we did reopen the issue, the decision in a small cause suit by the same Munsif as the one who in the first instance mishandled this original suit, would help us. His judgment is not upon the record, and would hardly be relevant; nor do we know what were the pleadings.

Accordingly the appeal will have to be dismissed with costs.

In this view the translation of Exhibit I becomes an academic question, but I may observe that the rendering which our translator pronounces the more probable seems to me also to be more suitable to the context. If the document is only dealing with a thatched superstructure it seems unnecessary to have troubled to enter it at all. The right on eviction to retain the poles and thatch was worth very little.

On the other hand to have promised a permanent dwelling site is not an unlikely bargain for the trustees to have made, if they were hard put to it to find drummers; and they may even

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not prevented from doing service by the plaintiffs but they wilfully ceased to render service. The question whether the defendants were paid their emoluments in full up to the date of their ceasing to render service is also concluded so far as the present case is concerned. On that question the judgment in Small Cause Suit No 487 of 1919 which was referred to on both sides is conclusive. The defendants preferred a revision petition against that judgment and that petition was heard by Odgers, J, along with the Second Appeal and was dismissed. It was argued for the respondent that the Small Cause Suit brought by the plaintiffs proceeded on the basis that the defendants were to be paid a fixed salary at 40 kalams of paddy for the year in question for their services to the temple, whereas under Exhibit I they are entitled to the whole of the net produce from the lands given to them under that document. If the 40 kalams did not represent the net produce from the lands, it was certainly open to the defendants to have raised that plea in the suit. The written statement filed by the defendants has not been filed in this case and it is not clear from the judgment whether that plea was raised or not. Be that as it may the finding that the defendants were fully paid for their services till April 1916 when they ceased to render services is now concluded by that decree and emphatically so because the plaintiffs got a decree against the defendants on the footing that the defendants had been overpaid 10 kalams for that period. It is thus clear upon the findings that without any default on the part of the plaintiffs, the defendants have wilfully ceased to render services from April 1916 and the question we have therefore to consider is whether for that reason under the terms of Exhibit I the plaintiffs are not entitled to possession of the sites sued for. Whatever might have been the case stated by the plaintiff in the plaint, the trial of the suit has throughout proceeded on the basis that the mutual rights of the parties are governed by Exhibit I and that is also the basis on which Odgers, J., proceeds in his judgment. The parties, however, are not agreed as to the right interpretation of Exhibit I in so far as it bears on the question before us. The plaintiffs say that under Exhibit I the defendants are entitled to the occupation of the sites only so long as they render services to the temple and that they are not entitled to continue in occupation when for wilful default on their part their services are dispensed with The defendants on the other hand contend that so far as the sites are concerned Exhibit I gives the same to them absolutely and that even if their services are dispensed with

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the trustees of the temple can only resume the 10 mahs of land given to them as emoluments for the office but not the sites in question. It has to be observed that the language of this part of Exhibit I is far from clear. It is certainly capable of both interpretations. That being so we have to see what the parties really intended with reference to the circumstances of the case. Ex. I evidences an agreement entered into by the trustees of the temple with one Ramaswami for the performance by him and his successors of the services of periamelam and chinnamelam in the temple. Ramaswami and his successors are to perform those services regularly and as remuneration therefor they are to enjoy the income from 10 mahs of land appertaining to the temple's quarter *pangu* in the village. The sites in question are referred to in the document as appertaining to the said quarter *pangu*. On a portion of the said site there was then a thatched shed. Ramaswami was to occupy the shed and he was also given the liberty to put up a superstructure on the vacant portion of the site for the chinnamelam. Under the terms of Exhibit I neither Ramaswami nor his successors could be dispossessed either of the lands or of the sites so long as they performed the services and did not commit any wilful default in the performance of the services Having regard to these considerations we have to see which of the two interpretations regarding the clause relating to the consequences of default has to be preferred If the terms of the document are clear no doubt effect must be given to the plain meaning of the words, but according to the Chief Interpreter of this Court whose translation of the document is set out by the learned Judge the expression "Manaikattu Kattukoppu" is ambiguous. It may be interpreted in two ways as he says. either as a compound word in which it will mean superstructure on the land or as separate words which may mean site and superstructure. If it was intended to give away the site also absolutely the correct way of expressing it would be "Manaikkattum Kattukkoppum." When it is remembered that the sites also appertain to the quarter *pangu* which the temple owns in the village being appurtenant to the 10 mahs of nanjas and punjas, the extent of the said share and that both the lands and the sites were given as remuneration for the office to be held so long as the services were performed, it would be difficult to sustain the defendants' case that the site which was intended for the residence of the service-holder was placed on a different footing from the rest of the lands with the income of which he was to maintain himself. Both

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were equal appanages of the office. We have also to remember that the grantors are the trustees of the temple who had no right to alienate any property of the temple absolutely though it was competent to them to make a grant of the lands to be enjoyed by the service-holder so long as he continues to hold the office. If the defendant's construction is to be adopted and there was so far as the site is concerned an absolute grant of the same to him irrespective of his continuing to perform the services or not, the result will be that even if he commits default on the very next day he could not be turned out of the sites. In my opinion it is hardly conceivable that such an intention could be imputed to the trustees. It is argued for the respondents that there was a separate consideration for the grant of the sites absolutely, because Ramaswami who had till then been living in a different village was brought over by the trustees to this village for the performance of services in the temple. But no such plea is raised in the written statement or in the issues nor was that point put forward before Odgers, J. I do not therefore think that the respondents can be allowed to raise any such point now.

Lastly it is contended for the respondent that the suit should have been dismissed because the plaintiff suppressed Exhibit I and brought the suit on a false case of oral agreement. No doubt the trial Court might have so disposed of the case But it did not. On the other hand, issues were framed and the suit was tried on the footing that the agreement between the parties was as set out in Exhibit I and on that basis the case has been tried throughout. It is with reference to the terms of Exhibit I that Odgers, J., has given his judgment. It is therefore far too late for the respondent to raise that point now Reading the learned Judge's judgment it seems to me that his conclusion might have been different if he had the finding which we now have that there was wilful default on the part of the defendants. In my opinion, the defendants are not entitled to keep possession of the sites even after their services have been rightly dispensed with

One other point was raised on behalf of the respondent, *viz.*, that they should be awarded compensation for the superstructure which they subsequently put up on the site. Whatever merits there may be in this point, it has to be observed that it is raised for the first time before us and we should be very loath to entertain a question at this stage which involves a further investigation as to facts. Moreover the defendants in

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this case admittedly knew that the only title they had to the land is under Exhibit I and they cannot claim any equity contrary to the terms of Exhibit I. I am therefore of opinion that the defendants cannot be allowed to raise that point now.

In the result I would set aside the judgment of Odgers, J. and of the Lower Appellate Court and restore the revised decree of the District Munsif, dated the 14th August, 1920, except as to costs and subject to the following modification, *viz*, that the defendants are given three months time from the date of the receipt of this decree by the Court of the District Munsif for the removal of the superstructure they have put up on the suit lands

As to costs as the plaintiffs brought the suit suppressing Exhibit I, I disallow their costs up to the date of the revised decree aforesaid of the District Munsif, and direct the defendants to pay the second plaintiff his costs incurred subsequently in the Lower Appellate Court and in this Court.

BY COURT. *Jackson, J.*—The presumable object of the revised Letters Patent is to treat as finally settled all points upon which the Judges hearing the Letters Patent Appeal were agreed, and only refer to the third Judge the points upon which they differed. It is therefore more important clearly to state the points of agreement than the points of difference.

In this suit we are agreed that it must be decided on the question of law each party has fulfilled his obligations under Exhibit I. Beyond that I doubt if there is any agreed point which can be taken as settled.

As for points of difference Jackson, J., considers that the Subordinate Judge in the first Appeal rightly decided the case, Thiruvenkatachariar, J., considers that he wrongly decided it. Jackson, J., considers that Remand Issue 2 was decided by the Sub-Judge and is now closed. Thiruvenkatachariar, J., considers that it is open.

Assuming that it is open, Thiruvenkatachariar, J., considers that it is settled by the judgment of the District Munsif, Tiruvadi, in S.C.S. No. 487 of 1919. Jackson, J., considers that judgment to be irrelevant. Thiruvenkatachariar, J., considers that the finding on Remand Issue 3 is also decisive on this question that on that finding it lay on the defendants to make out a justifiable cause for their default in rendering service and in that they failed.

As regards the interpretation of Exhibit I, Thiruvenkatachariar, J., holds that *manakat kattu koppu* means site-superstructure or superstructure on site.

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of appeal which existed once cannot be taken away by an Act unless it is expressly retrospective. The only logical effect of applying that principle should be that if two Judges hear a case, deliver their judgments and for some reason the senior Judge's judgment prevails, then the right of appeal which existed before to a Bench of three Judges is not taken away and continues to exist, but the effect of the amended clause (36) of the Letters Patent is not to deprive the right of appeal but to change the procedure as to what two Judges should do when they find that they are about to differ The clause says that the question shall be referred to a third Judge. To argue that the two shall continue to deal with the case as under the old clause and that, when their judgments are delivered, the rule that the senior Judge's judgment should prevail should still apply is to argue that a rule of procedure which ceased to exist must be applied so as to enable the party in whose favour the senior Judge's judgment is to put the opposite party to the necessity of an appeal and thereby to have the chance of that judgment not being appealed against. To insist on the application of such a procedure is really to say that a party has a vested right in two Judges continuing the old procedure and not referring to a third Judge. Now it is well established that a party can have no vested right in a mere right of procedure. Here what the respondent wants is not the right of appeal, for it is not he that loses the right of appeal. He wants certain procedure to be followed so as to put the opposite party to the necessity of appealing. In *Attorney-General* v. *Sillem*,[5] the questions were whether the right of appeal can be created by a tribunal or by legislative authority only and secondly whether a new right of appeal would affect existing suits. On the first question, the noble Lords differed but on the second question Lords Westbury, Cranworth and Wensleydale expressed their opinions. Lord Westbury observed:

"It was strongly contended by the respondents that even if the Barons of the Exchequer had power to make the rules in question, they had no power to make them apply to pending proceedings, and that the attempt to do so was unjust

"This argument is not, in my opinion, well founded." (Page 727.)

Lord Cranworth was of the same opinion. (Pages 735 to 737).

Lord Wensleydale expressed himself more explicitly:

" . . I think that if it were an alteration in the mode of proceeding only, to the prejudice of the claimants, the objection would not prevail.

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5. (1864) 10 H.L.C. 704. 11 E.R. 1200.

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v.
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ing to act in the discharge of their official duties. The object obviously is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they were acting or purporting to act as public servants. The policy of the legislature is, we conceive, to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and, if sanction is granted, to confer on the Local Government, if they choose to exercise it, complete control of the prosecution. We can see nothing in these precautions to which the public at large can legitimately take exception and consider that the sub-section should be construed as widely as it has been framed. If the policy of the legislature has been to afford a reasonable protection to public servants against vexatious charges arising out of the performance by them of their official functions, it has not been conspicuously successful. By a series of judicial decisions that protection has been refined down to the vanishing point. A learned Judge of this Court, Seshagiri Aiyar, J., remarked in *Sankaralinga Tevan* v. *Avudai Ammal*[1]:

"If this argument is pushed to its logical conclusion, no public servant or Judge can have the safeguard of a sanction, as it is not within the powers conferred upon such an officer to commit an offence Any offence committed by such a person must *prima facie* be beyond his official rights and duties. I do not think that such a result is the necessary consequence of the language employed by the legislatrue."

And yet that is the effect of some of the decisions that the commission of an offence being no part of a public servant's duties, no sanction is required for his being prosecuted for an offence alleged to have been committed by him while he was discharging or purporting to discharge those duties. The language of S. 197, Criminal Procedure Code, does not, in our opinion, afford any justification for such a construction.

Numerous decisions have been cited on the point. Most of them turn on the wording of the corresponding sections in the Codes of 1882 and 1898. In this connection we endorse the criticism of Mitra in his commentary on the present Criminal Procedure Code, *see* page 521 of the 6th edition:

"These cases, though correctly decided under the old Codes, would be of no authority now, as the language of the present section materially differs from the language of the old law. Under the present section it will not be necessary to decide whether the fact of the accused being a Judge or a public servant was a necessary element in the offence or whether the offence was one

1. (1916) 35 I.C. 826.

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which could not have been equally committed by a private person These nice questions would no longer arise; if it is found that the Judge, Magistrate or public servant has committed an act at a time when he was doing (or purporting to do) an official duty, this will be sufficient to attract the provisions of this section. In other words, the legislature has now given a greater protection to the officers concerned than it did under the old section.''

At the same time, we would express a doubt whether the legislature, when it departed, in the Codes of 1882 and 1898, from the language of the Code of 1872, really intended to diminish the protection afforded to public servants by S. 466 of that Code. It is not permissible for us, in attempting to interpret S. 197 of the present Code, to rely on the Statement of Objects and Reasons that led to its modification but it is of some significance as indicating what view the Legislature took of section 466 of the Code of 1872 and with what intention section 197 in its present form was framed. As stated, the intention was "to amplify the words with the object of rendering the section clear, reverting rather to the wording of the Code of 1872." The inference appears to be that the legislature had not intended in the Codes of 1882 and 1898 to abandon the policy of the Code of 1872, but, finding that its intention had been misinterpreted by the Courts, decided to go back to that Code.

The leading Madras case *The Municipal Commissioners for the City of Madras* v. *Major Bell* [2] was decided with reference to the Code of 1898. Major Bell, who was a public servant, was prosecuted for having, in his official capacity, brought timber into the City without the statutory license. The Bench overruled the plea that sanction was necessary

''as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant ''

In arriving at this conclusion, they attached the greatest importance to the difference in language between section 466 of the Code of 1872 and section 197 of the Code of 1898, admitting, at the same time, that, if they had to apply section 466 to the facts of the case, they would have been obliged to arrive at exactly the opposite conclusion. Section 466 read as follows:—

''A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direc-

2. (1901) I.L.R. 25 M. 15.

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tion of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve. No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty, unless with the sanction of Government."

Its effect was considered by Pontifex and Field, JJ., in an unreported case which is referred to in *Nando Lal Basak* v. *Mitter*.[3] They decided, on the facts, that the second paragraph of the section applied and that sanction was necessary. As regards the first paragraph, they thought that it "was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which being a public servant is a necessary element."

In other words, prosecution for all offences alleged to have been committed by public servants purporting to act as such required sanction, while prosecutions for all but a very limited class of offences alleged to have been committed by public servants when acting as such did not. With great respect, we think, that the legislature when it decided to re-enact the provisions of section 466 took a more correct view of what that section was intended to mean. Where, in the present section 197, it used the words "while purporting to act in the discharge of his official duty," it was, in effect, reproducing the second paragraph of the old section. When it used the words "while acting . . . . in the discharge of his official duty," it was recasting the first paragraph in a clearer and more compendious form. As we have stated already, we think it probable that the legislature, though it adopted a different phraseology in 1882 and 1898, never intended to depart from the policy it had laid down in 1872 and explicitly reverted to it in the present Code, because that policy had been nullified by a series of judicial decisions. We will refer to only one other case, which was decided with reference to the present Code. In *Sivaramakrishna Aiyar* v. *Seshappa Naidu*[4] Curgenven, J., held that the offence contemplated by section 197 "must contain an element necessarily dependent upon the offender being a public servant." We are of opinion that that is too limited a construction of the section. The question is not as to the nature of the offence, but

3. (1899) I.L.R. 26 C. 852 at 857.
4. (1928) I.L.R. 52 M. 347: 56 M.L.J. 263.

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whether it was committed by a public servant acting or purporting to act as such in the discharge of his official duty. We hold that, if the offence alleged was committed by the public servant, while he was actually engaged in or purported to be engaged in the discharge of his official duty, sanction is required. Assuming that *In re, Gulam Muhammad Sharif-ud-daulah*[5] was wrongly decided, as the law then stood, the decision would certainly be correct in our judgment as the law now stands.

It only remains to apply this principle to the facts of the present case. The complainant's story is that the Village Magistrate sent his Talayari to fetch her in connection with a case before him, in which she had not appeared, told her that "for not appearing when summons was sent to her, he sentenced her to imprisonment in the *chavadi*," and he confined her in his *chavadi*, the place where the persons he sentences are by law to be confined. It is clear that—assuming all this to be true—he was purporting to act in the discharge of his duty as a Village Magistrate. Sanction for his prosecution was therefore necessary. We quash the proceedings. It will, of course, be open to the complainant, if and when she obtains sanction from the proper authority, to file a fresh complaint.

N.S. *Proceedings quashed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Vellanki Lakshmi Narasayamma Rao Bahadur (Sree Raja), Zamindarini of Tiruvur .. *Assessee**

v.

The Commissioner of Income-tax, Madras .. *Referring Officer.*

F. B.

Lakshmi Narasayamma Rao Bahadur v. Commissioner of Income-tax Madras.

Income-tax Act (XI of 1922), S 2 (1)—Agricultural income under—Will—Legacy under—Sum of money payable as—Liability for assessment of

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*O.P. No 199 of 1928 15th March, 1929.

5 (1886) I.L.R. 9 M. 439.

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Lakshmi Narasayamma Rao Bahadur v. Commissioner of Income-tax, Madras.

By his will, a deceased Hindu appointed his wife as the executrix, gave her a life-estate in his property and directed her to give each of his daughters, petitioner and another, a sum of Rs 600 per month. That sum was not paid and it fell into arrears The petitioner accordingly obtained a decree for Rs. 80,000 being the total of the said arrears

Held, that the legacy of Rs. 600 per mensem payable under the will was not agricultural income as defined in S. 2, cl (1) of the Income-tax Act, and was therefore not exempt from the payment of income-tax under the Act.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act, XI of 1922.

2. Sri Raja Vellanki Lakshminarasayamma Rao Garu, Zamindarini of Tiruvur (hereinafter called the petitioner) objects to an assessment made on her under section 23 (3) of the Income-tax Act for the year commencing on the 1st April 1925 on an income of Rs. 71,254.

3. The facts of the case are—

(*a*) The petitioner is the daughter of the late Sri Raja Varadaraja Appa Rao Bahadur, Zamindar of Nuzvid and other Zamins (hereinafter referred to as the Testator). The testator owned large moveable and immoveable properties. He had no male issue but had two daughters—the petitioner and another, Subbamma Rao Garu.

(*b*) The testator had no desire to adopt a son nor was he in favour of his wife adopting one. He left three wills, dated 26th June, 1908, 6th January, 1911, and 14th August, 1916 (appended as Annexures A, B and C). The salient provisions of the wills so far as they are necessary for the purposes of this case were:

(*i*) that the whole estate of the testator both moveable and immoveable over which he had absolute right of enjoyment and the whole moveable and immoveable estate that might devolve on him in future should after his demise be in the possession and enjoyment of his wife Chellayamma Rao Garu during her life-time and that she should have only a life-interest therein and not the right to make a gift or effect a mortgage or sale, etc.;

(*ii*) that after the demise of the wife all the properties should go to his two daughters in equal shares;

(*iii*) that after the life-time of his daughters the properties moveable and immoveable should devolve on the male issue of the daughters and if they had no male issue, on their female issue and their descendants from generation to generation with absolute right of sale, mortgage or gift, etc.;

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(*iv*) that if during the life-time of his wife either of his daughters should die without issue the half share of the estate that would devolve on her after the death of his wife should go to the surviving daughter, and after her demise to her issue;

(*v*) that if during the life-time of his wife both his daughters should die leaving issue the estate should after her demise go in two equal shares to the issue of his daughters;

(*vi*) that if at any time during the life-time of his wife either of his daughters should desire to live separately from their mother such daughter should be paid by the wife an allowance of Rs. 600 per mensem.

Under this will the testator's wife was appointed the executrix of the will.

4. The petitioner began to live separately from her mother, the widow of the testator. She therefore claimed from the executrix the allowance of Rs. 600 per mensem provided under the will. The executrix apparently contested the petitioner's right and the latter had to file suits O.S. Nos. 99 of 1919 and 50 of 1922 on the file of the Subordinate Court, Bezwada, to recover the allowances. The Subordinate Judge decreed her claim and during the official year 1924-25 she recovered from the executrix sums aggregating to Rs. 83,254-10-9 being the allowance due to her from 1919 *plus* interest thereon at the rate of 6 per cent. per annum.

5. For the assessment of the year 1925-26 the petitioner in response to the notice issued by the Income-tax Officer under section 22 (2) of the Income-tax Act returned this sum of Rs. 83,254 as her income but contended:

(1) That she was not liable to pay any income-tax on this sum as it was paid to her from the agricultural income of an estate which was paying peishcush to Government and was therefore exempt from income-tax, and

(2) that if the receipt was held to be income liable to tax, a sum of Rs. 30,000 being the expenses incurred by her on the litigation should be allowed as a deduction.

The Income-tax Officer held that the allowance received by her was not "agricultural income" in her hands and was not exempt under section 4 (3) (viii); he admitted the principle of the other claim, but as the petitioner had not proved the actual amount expended by her on the litigation he fixed the expenditure incurred by her at Rs. 12,000.

Deducting this sum of Rs. 12,000 from the amount received by the petitioner as allowances, *viz.*, Rs. 83,254, the Income-tax Officer assessed the petitioner to income-tax and super-tax on the balance of Rs. 71,254. A copy of the order of the Income-tax Officer is appended as Annexure D,

6. Against this assessment the petitioner unsuccessfully appealed to the Assistant Commissioner. A copy of the Assistant Commissioner's order is appended as Annexure E.

The petitioner now requires me to refer for the opinion of the High Court the following question of law:—

(1) Whether on a construction of the wills by the late Sri Raja Varadaraja Appa Rao Bahadur Garu the amount paid to the appellant out of the income of the estate is not agricultural income under the Act.

To claim exemption from payment of tax on the ground of "agricultural income" under section 4 (3) (viii) read with section 2 (1) of the Income-tax Act, an assessee should prove either

(1) that the income was rent or revenue derived by him from land which is used for agricultural purposes and is assessed to land revenue in British India or is subject to a local rate assessed and collected by officers of Government as such, or

(2) that it was income derived by him from such land by agriculture.

The income was in this case derived by the petitioner from the legacy bequeathed under the father's will. The will itself does not direct the executrix to pay the allowance to the petitioner from any specific land or lands used for agricultural purposes. It could have been paid out of the non-agricultural income of the estate just as much as out of the agricultural income and it was not contended or proved that the ultimate source from which the executrix found the money to pay the daughter was identifiable. Even if this had been the contention I do not consider that it affects the character of the income so far as the petitioner is concerned for she derives it not from any land which she owns or possessed, but from the legacy bequeathed to her by the testator. I am therefore of opinion that the amount in question is not agricultural income within the meaning of the Income-tax Act.

V. Govindarajachari for assessee.

M. Patanjali Sastri for Referring Officer.

The Court delivered the following

JUDGMENT.—The only question in this case is whether the legacy received by the assessee under the terms of her father's will and in respect of which she got a decree is exempt from the payment of income-tax being agricultural income. Her father was the Zamindar of Gannavaram and he executed a will which is annexed as Exhibit C. Under the will he appointed his wife as the executrix, gave her a life-estate in the property and directed her to give his daughters a sum of Rs. 600 each per month. This sum of Rs. 600 was not paid and it

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fell into arrears. The daughter got a decree for Rs. 80,000 in the Sub-Court of Bezwada and this sum is taxed as income.

It is argued for the assessee that she got a rent charge on the income of the estate in respect of the amount that the executrix had to pay and that this sum of Rs. 600 should be treated as agricultural income as defined in S. 2, clause (1). We think that this legacy cannot be brought under that clause and that she was rightly assessed on the amount she realised as arrears of maintenance. We answer the reference accordingly and direct that the assessee should pay Rs. 250 as costs of this reference.

A.S.V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Thubati Kotayya .. *Appellant** (*Plff.*)

v.

The President, Taluk Board, Narasaraopet and another .. *Respondents* (*Defts.* 1 *and* 2).

Kotayya v. The President, Taluk Board, Narasaraopet.

Election—Taluq Board—Nomination of candidate—Two nomination papers by the same voter in favour of the same candidate—Validity—Rejection of the later nomination paper by the President of the Board—Suit for declaration that the plaintiff was validly nominated and injunction restraining the President from holding the election—Maintainability—Madras Local Boards Act—Rules for the Conduct of Elections 3 and 33

Rule 3 of the Rules for the Conduct of Elections framed under the Madras Local Boards Act does not prohibit a voter from subscribing more than one nomination paper in favour of the same candidate; it only prohibits him from nominating more candidates than there are vacancies

A suit by a candidate standing for election to a Taluq Board for a declaration that he was validly nominated for the election and that the rejection of one of his nomination papers by the President of the Taluq Board was wrong and for an injunction restraining the President from holding the election is not barred by Rule 33 of the Rules for the Conduct of Elections framed under the Madras Local Boards Act.

Sarvothama Rao v. *The Chairman, Municipal Council, Saidapet,* (1923) I.L.R. 47 Mad. 585: 45 M.L.J. 23 followed.

Second Appeal against the decree of the District Court of Guntur in Appeal Suit No. 261 of 1928 preferred against the decree of the Court of the District Munsif of Narasaraopet in Original Suit No. 605 of 1928.

P. Venkataramana Rao and *A. Lakshmayya* for appellant.

Ch. Raghava Rao and *D. Krishnaswami* for respondents.

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*S.A. No. 1506 of 1928. 27th February, 1929.

Kotayya v. The President, Taluk Board, Narasaraopet.

The Court delivered the following

JUDGMENT.—A candidate had to be elected to represent Nadandla Circle on the Narasaraopet Taluk Board. In respect of that single vacancy, there were three candidates for election, the plaintiff and the 2nd defendant being two of them. The election was to be held on the 13th August, 1928, and the nomination papers were to be presented on the 17th July between 5 and 6 P.M. The President of the Taluk Board rejected the nomination of the plaintiff as invalid, who, thereupon, has instituted the present suit to obtain a declaration that he was validly nominated and an injunction restraining the former from holding the election.

There were ten nomination papers and four out of them are material to the present enquiry. They are the following:—

Serial No	Time of presentation	Candidate.	Proposer	Seconder
2	5-4 P M	2nd Deft	S. Subbiah	D Sriramulu.
5	5-6 P M	Plaintiff	D Sriramulu	P. Tirupathi-rayudu
6	5-6 P M	Plaintiff	G Amariah	S Subbiah
10	5-59 P M	Plaintiff	G Amariah	K Venkiah

This table shows that the plaintiff's name was proposed by Sriramulu in Paper No. 5, but that same person had, as seconder, also subscribed the earlier Paper No. 2 relating to the 2nd defendant. Again, Subbiah who seconded the nomination of the plaintiff in Paper No 6 had as proposer subscribed the 2nd defendant's paper, that being the nomination received earlier by the President Under the Rules for the Conduct of Elections, Nomination Papers Nos. 5 and 6 were rejected by the President as invalid. So far, his decision is correct and cannot be questioned. I reproduce below the relevant rules.

2. (1) The nomination of every candidate shall be made by means of a nomination paper in Form No. 1, which shall, on application, be supplied free by the President to any elector whose name is on the electoral roll for the circle or ward.

(2) Every nomination paper shall be subscribed by two such electors as proposer and seconder and the candidate shall subscribe a declaration on it expressing his willingness to stand for election.

3. (a) The same elector may subscribe as many nomination papers as there are vacancies to be filled but no more. Each candidate shall be nominated by a separate nomination paper.

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(*b*) Where a person has subscribed whether as proposer or seconder a larger number of nomination papers than there are vacancies to be filled those of the papers so subscribed which have been first received up to the number of vacancies to be filled shall be deemed to be valid.

(*c*) The rejection of a nomination paper of any candidate on the ground of any irregularity in respect thereof shall not affect the validity of the nomination of the candidate if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

The President also rejected the nomination paper No. 10 on the ground that the moment Amariah subscribed Paper No. 6 his right became completely exhausted and that he had no further right to sign his name on any subsequent nomination paper. The District Munsif held that the President's view was wrong but the District Judge reversed the decision of the Munsif. In my opinion, the ruling of the President cannot be supported The effect of the rules quoted above is, to enact that no voter shall be at liberty to nominate more candidates than there are vacancies; for example, if there are three vacancies and five candidates, each voter may validly nominate three of the aspirants and the reason is plain; he may want all the three to succeed and in his conduct in nominating as many as three, there is no possible inconsistency. What is sought to be prevented by the rules is, that no voter shall nominate a larger number of candidates than there are vacancies. Why should a voter be forbidden to subscribe more than one nomination paper in favour of the same candidate? Take another instance Supposing there are three vacancies; it is not suggested that a voter may not sign three papers proposing or seconding the same candidate If that can be validly done when there are three vacancies, why must a different rule be observed when there is a single vacancy? In this case, Amariah, it must be noted, proposed the plaintiff and not a different candidate in Paper No. 6. In other words, the papers subscribed by Amariah are undoubtedly more in number than there are vacancies; but, what really matters is, there was but one vacancy and he put forward but one candidate. I am of the opinion that the rules must be reasonably construed, for, the view contended for by the respondent leads to an absurdity.

The language of these rules is borrowed from certain English enactments and it is noteworthy that there is not a single reported case on the point. That shows beyond a doubt that

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such a meaning as is urged for the respondent has never before been contended for. In short, Rule 3 (*a*) means—the same elector may nominate as proposer or seconder only as many candidates as there are vacancies but no more. . . . Rule 3 (*b*) is a corollary of Rule 3 (*a*). It means—no elector can validly nominate more candidates than there are vacancies. If these rules are read in that sense, they give rise to no difficulty. That is their natural, proper and reasonable interpretation.

Another point has been taken by the respondent. He contends that the plaintiff has no right of suit. This point is covered by authority, see *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet.*[1] Both the Lower Courts have rightly rejected this contention. The respondent's learned Counsel refers to Rule 33 which reads thus:

"If any difficulty arises as to the holding of any election under these rules, the Local Government may by order do anything not inconsistent with these rules which appears to them to be necessary for the proper holding of the election"

I fail to see how this takes away the right of action which the plaintiff undoubtedly possesses. The Local Government has not made any order under this rule and the plaintiff's right of suit subsists.

In the result, I reverse the decision of the Lower Appellate Court and restore that of the District Munsif with costs throughout to be paid by the 2nd defendant.

N.S. *Second Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD CARSON, LORD ATKIN AND LORD SALVESEN.

P. C.

Raja Reshee Case Law v. Satis Chandra Pal.

Raja Reshee Case Law .. *Appellant** (*Plff.*)

v.

Satis Chandra Pal and another .. *Respondents* (*Defts.*)

Bengal Tenancy Act (VIII of 1885), S. 109—Bar under—Condition precedent to—S 105 of Act—Application under—Withdrawal of, with or without permission of Court—Effect

If an application is made under S 105 of the Bengal Tenancy Act and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of S 109 of the Tenancy Act It is the making of the application that brings into play the prohibition of S 109

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*P.C -Appeal No 16 of 1928 5th March, 1929.

1. (1923) I.L.R. 47 M. 585 45 M.L.J. 23.

P. C.

Raja Reshee Case Law v. Satib Chandra Pal.

Purna Chandra Chatterji v. *Narendra Nath Chowdhury*, (1925) I.L.R. 52 Cal 894 (F.B.) approved

Consolidated Appeals No. 16 of 1928 from two judgments and decrees, dated the 26th January, 1926, of the High Court, Calcutta (N. R. Chatterji and Page, JJ.) affirming two judgments and decrees, dated the 2nd April, 1924 and 17th April, 1924, of the Subordinate Judge of Midnapore.

The High Court held, following the judgment of the majority of the Full Bench in *Purna Chandra Chatterji* v. *Narendra Nath Chowdhury*[1] that the suits were barred by the provisions of section 109, read with sections 105 and 106 of the Bengal Tenancy Act, 1885, and the correctness of the Full Bench decision was the main question for determination on the appeal to the Privy Council.

The relevant sections of the Tenancy Act will be found in the report in *Purna Chandra Chatterji* v. *Narendra Nath Chowdhury*[1] and it is unnecessary to reproduce them *in extenso* here.

L. de Gruyther, K.C. and *Bhugwandin Dube* for appellant.

L. C. Graham-Dixon and *P. N. Bannerji* for respondents.

De Gruyther, K.C., contended in argument that the decision of the Full Bench in *Purna Chandra Chatterji* v. *Narendra Nath Chowdhury*[1] was not sound.

5th March, 1929. Their Lordships' judgment was delivered by

Lord Salvesen.

LORD SALVESEN.—These appeals have been brought to settle a question which has been frequently discussed before Indian tribunals and has resulted in conflicting decisions So far as India is concerned the law was finally settled by a decision of the Full Bench of the High Court of Bengal, *Purna Chandra Chatterjee* v. *Narendra Nath Chowdhury*.[1] In the present case the judgment followed the decision of the Full Bench, and the object of the present appeals is in effect, to bring that decision under review.

As the facts are not in controversy it is unnecessary to recapitulate the summary of these contained in the judgment appealed from. It is sufficient to say that the appellant who is the owner of a large area of ground, of which the first respondent (who alone appeared before the Board), holds a lease, had presented three applications in the Court of the Revenue Officer, one under section 106 and two under section 105 of

1 (1925) I.L.R. 52 C 894 (F.B)

P. C.

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Lord Salveren.

the Bengal Tenancy Act of 1885. The latter were withdrawn without any express leave being granted to bring a fresh suit, while in the former such permission was granted. Thereafter, the present suits (two) were filed by the appellant in the Court of the Subordinate Judge of Midnapore, dealing admittedly with the same subject-matter as was contained in the previous applications in the Court of the Revenue Officer. The respondents pleaded that the suits were barred under section 109 of the Bengal Tenancy Act and this plea has been sustained in all the Courts below.

Section 109 is in these terms:

> "Subject to the provisions of section 109-A a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive)."

The argument for the appellant which had the support of Suhrawardy, J., in the Full Bench case cited was that when a suit is allowed to be withdrawn with leave to bring a fresh suit, it should be regarded as never brought, and that the same result should be reached in the case where a suit is simply withdrawn before evidence has been heard although no permission has been asked or granted by the Court of the Revenue Officer to institute a fresh suit in a Civil Court. This argument did not commend itself either to the Judges who decided the present case or to the other members of the Full Bench. Walmsley, J., said:

> "In my opinion it is the making of the application that brings into play the prohibition of section 109 and the answer that I would give to the reference is to that effect, namely, that if an application is made under section 105 of the Bengal Tenancy Act and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject-matter is barred by the provisions of section 109 of the Tenancy Act."

Their Lordships are in entire agreement with this view. They think that the language of the section admits of no other construction and that such an exception as the appellant contends for cannot be implied. The policy of section 109 of the Act is to prevent multiplication of procedures by enacting that where an application is made in one or other of the competent Courts it shall be prosecuted in that Court and in no other.

They will therefore humbly advise His Majesty that the appeals should be dismissed with costs to the respondent who appeared.

Solicitors for appellant: *Watkins & Hunter*.

Solicitor for respondents: *H. S. L. Polak*.

K.J.R. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Musunoori Satyanarayanamurti .. *Appellant** (*Deft.*)

v.

Chekka Lakshmayya and others .. *Respondents* (*Plffs.*).

Satyanarayanamurti v. Lakshmayya.

Transfer of Property Act, Ss 6 (c) and 54—Transfer of easement—Grant of easement—Distinction—Document creating or granting easement—Registration, if necessary

The creation or grant of an easement is different from the transfer of an easement, for the creation of an easement is the act of an owner imposing a burden on his property while the transfer of an easement is the act of the dominant owner and is inseparable from the transfer of the dominant heritage under section 6 (*c*) of the Transfer of Property Act Consequently, a document which creates or grants an easement does not require registration for its validity under section 54 of the Transfer of Property Act

Bhagwan Sahai v Narsingh Sahai, (1909) I L R 31 All 612 followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 102 of 1924 (A.S. No. 72 of 1923—District Court, Godavari) preferred against the decree of the Court of the District Munsif of Ramachandrapur in Original Suit No. 624 of 1918

G. Lakshmanna and *A. Satyanarayana* for appellant.

V. Suryanarayana for respondents.

The Court delivered the following

JUDGMENT.—The facts necessary for the decision of this second appeal may be briefly stated as follows:—

The defendant is the appellant. Plaintiffs sued the defendant to establish their right to let out drainage water along the *bodi* (drainage channel) marked CC-1 in the plan and for the issue of an injunction restraining the defendant from obstructing the plaintiffs in repairing the said channel. The drainage channel passes through the defendant's fields which lie to the south of the plaintiffs' lands. Plaintiffs' claim to discharge the water through the channel is based upon an easement right granted to the first plaintiff under Ex. E by the defendant's father. Ex. E, dated 30th July, 1911, is a letter written by the defendant's father, Dikshithulu, to the 1st plaintiff It runs as follows:—

"You wanted a *bodi* for flowing freely the surplus water through the land along the eastern bund of Re-Survey Inam No. 187 owned by us in Pedavarthi village Having given a *bodi* to you in the said manner, I wanted you to give me at a future time a *bodi* to my land No 187 through your land No 75 in case I dig the earth from my land and lower the level of the same, and you consented to the same On this understanding I allow a *bodi* through my land."

*S.A. No. 628 of 1925 19th September, 1928.

The defendant contended (1) that Ex. E is inadmissible in evidence for want of registration under section 54 of the Transfer of Property Act, and (2) that, if admissible in evidence, the document is not binding on him with respect to a portion of the *bodi,* inasmuch as, when his father granted the easement, he had no right over that particular portion of the property, which in 1916, *i e.,* after his father's death, came to him (the defendant) by way of reversion. The lower appellate Court disallowed the contention of the defendant on both these points and decreed the plaintiffs' suit. These points are again urged before me in Second Appeal.

Point No. 1.—In support of this contention reliance is placed upon clauses (1) and (2) of S. 54 of the Transfer of Property Act. Clause (1) states that "Sale is a transfer of ownership in exchange for a price paid or promised, or part paid and part promised." Under clause (2) "Such transfer . . . . . . in the case of a reversion or other intangible thing can be made only by a registered instrument". It is argued that, under Ex. E, an easement right, that is, a part of the right of ownership as contemplated in clause (1) of section 54 of the Transfer of Property Act has been transferred to the 1st plaintiff and this being a "transfer of an intangible thing" as contemplated in the second clause of that section, it can only be done by a registered instrument and since Ex. E is not registered, it is inadmissible in evidence. Under section 6 (*c*) of the Transfer of Property Act an easement cannot be transferred apart from the dominant heritage Section 54 of the Act taken along with section 6 (*c*) would appear to contemplate the transfer of an existing easement as distinguished from the creation of the imposition of a new easement It is clear that there is a distinction between the transfer of an existing easement and the creation or grant of a new easement. The transfer of an existing easement is the act of the dominant owner and is inseparable from the transfer of the dominant heritage, while the creation of a new easement is the act of an owner imposing a burden on his property. On this reasoning the grant of an easement does not involve such a transfer of ownership in immoveable properties as is contemplated by section 54 of the Transfer of Property Act; hence Ex. E does not require registration.

The arguments addressed to me were all elaborately considered by the learned Judges of the Allahabad High Court in *Bhagwan Sahai* v. *Narsingh Sahai*[1] and overruled. It was

1 (1909) I.L.R 31 A 612

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held in that case that an agreement granting an easement right did not require registration, not being a transfer of ownership as contemplated by section 54 of the Transfer of Property Act. Prior to the enactment of the Easements Act, Act V of 1882, it was laid down by this Court in *Krishna* v. *Rayappa Shanbhaga*[2] that it was not necessary that the imposition of an easement should be evidenced by a written instrument. In his Anglo-Indian Codes, Dr. Whiteley Stokes in the introduction to Act V of 1882 says that the Act, following the decisions of the Madras High Court and deviating from the English Law, does not require the express imposition of an easement to be evidenced by writing. Peacock in his Tagore Lectures also expresses the same opinion. Mitchell in his commentary on the Easements Act, Second Edition, page 46, states that

"by the law of India, wherever the Transfer of Property Act applies, the grant of easement by way of sale must be made by a registered instrument, an easement being an intangible thing, and if made by way of gift must also be by a registered instrument signed by or on behalf of the grantor and witnessed by at least two witnesses"

The learned author does not cite any authority in support of this proposition. Apart from the argument based on the meaning of the expression "transfer of ownership" used in section 54 of the Transfer of Property Act, these are the only authorities cited by the learned advocate for the appellant. As I have already pointed out, all these arguments and authorities have been, if I may say so with respect, very carefully and elaborately considered in *Bhagwan Sahai* v. *Narsingh Sahai*[1] and I cannot do better than refer to the exposition of the law on this point contained in that judgment in answer to the appellant's arguments. In that case

"the owner of a house undertook by an 'agreement' to permit the owner of an adjoining house when he built a second storey, which was in contemplation, to discharge rain water and also water used for daily household purposes into the premises of the former"

Referring to the argument that by this "agreement" its executant transferred a portion of his right of ownership as contemplated in section 54 of the Transfer of Property Act, Tudball, J., made the following observations:

"Prior to the execution of the deed, he had the right to prevent the discharge by the appellant of the soiled water upon his tenement, as that would have been an invasion of his right He did not transfer this right to the defendant. He relinquished it, and it then ceased to exist *pro tempore*. It was not that right which arose in the defendant but a

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1. (1909) I.L R. 31 A 612. 2. (1868) 4 M.H.C.R. 98.

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totally opposite right, one hostile to the right which till then had reposed in the plaintiff's vendor. The one right came into existence when the other came to an end. A fresh burden was imposed on the servient tenement, the owner of which lost one of his rights, but he did not transfer the right so lost to the owner of the dominant tenement. The right lost was one which might possibly revive in the future. It seems clear to me that the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by section 54 of the Act. Where under that section an easement is transferred, it must be so transferred along with the dominant heritage. There is no other way of transferring it and this arises by reason of the nature of the right. It exists only for the benefit of the heritage and to supply its wants. There is nothing in law which necessitates the creation of an easement being evidenced by writing."

Then the learned Judge proceeded to discuss the authorities to which I have already drawn attention. Banerji, J., also expressed a similar view. This decision was followed by Jackson, J., in *Kondayya* v. *Veeranna*.[3] A Bench of the Calcutta High Court in *Sital Chandra Chaudhury* v. *Allen J. Delanney*[4] has pointed that the provisions of the Transfer of Property Act have no application to the creation of easements and that the Act was not intended to deal with them. Accepting the principle laid down in these decisions, which I am prepared to follow, I hold that Ex. E is not inadmissible in evidence for want of registration.

Point No. 2.—The argument on this point relates to a question of fact. What is argued is this: that a portion of the land through which the *bodi* passes did not belong to the defendant's father in 1911, that at that time, that portion was in the possession and enjoyment of one Brahmakka, a widow, that she died in 1916, four years after the death of the defendant's father, that the property then devolved on the defendant as reversioner, and so the agreement executed by his father who had no title to the property at that time is not binding on the defendant, so far as it relates to that particular portion of the property. It is contended that, if the facts are true, relief can be given to the plaintiffs only with regard to a portion of the *bodi*, that this would be useless and so the lower appellate court should have on this ground alone dismissed the plaintiffs' suit altogether, the granting of an injunction being only a discretionary remedy. On this question of fact the first court found in favour of the appellant, but the learned Subordinate Judge, differing from the District Munsif, found against him. The finding of the Subordinate Judge is that the entire extent of the *bodi* runs through the land to which the defendant's father had

3 A.I.R. 1926 M. 543. 4 (1916) 34 I.C. 450.

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full title in 1911. Mr. Lakshmanna in a very vigorous argument tried to show that this finding of the Subordinate Judge is perverse, but I am not satisfied that it is so. The Commissioner's report supports the appellant's contentions on this point. The learned Sub-Judge in discussing the Commissioner's report refers to him as the "enterprising Commissioner". Mr. Lakshmanna draws my attention to this and states that the learned Judge begins the consideration of the question with a decided prejudice against the Commissioner and his views. It seems to me that the reference to the Commissioner as the "enterprising Commissioner" does not necessarily show that the Judge, in discussing his report, has made up his mind beforehand to differ from it. I agree there is no justification for using the language which the Subordinate Judge has used in thus referring to the Commissioner; but that does not necessarily mean that the Judge has not applied his mind to the evidence before him in arriving at his conclusion After considering the Commissioner's report on its merits, he mentions some general reasons for disbelieving the defendant's case (*see* para. 12) and he disbelieves the evidence of D.W.s 4, 5 and 6, whose evidence was accepted by the District Munsif (*see* para. 13). As the question is one of fact and as the finding is not perverse, in Second Appeal, I must accept the Subordinate Judge's conclusion that the defendant's father had title to and was in enjoyment of the entire land through which the suit *bodi* passes. This argument also must be overruled.

In the result the Second Appeal is dismissed with costs

N.S. *Second Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD SHAW, LORD DARLING AND SIR LANCELOT SANDERSON.

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Mt. Ekradeshwari Bahuasin Saheba v. Homeshwar Singh.

Musammat Ekradeshwari Bahuasin Saheba .. *Appellant** (*Plaintiff*)

v.

Homeshwar Singh and others .. *Respondents* (*Defts.*).

Hindu Law—Widow—Maintenance for—Rate of—Data for fixing—Principle on which rate to be fixed—Proportion to annual income allowed to another widow of family if affords a principle of law for fixing rate—Discretion of Indian Courts as to rate—Privy Council's interference with—Conditions—Forfeiture of right to maintenance—Grounds—Leaving husband's resi-

*P.C. Appeal No 128 of 1927 5th March, 1929.

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dence and choosing another if and when one—Enhancement of maintenance—Liberty to apply for, in suit itself—Reservation of, in decree awarding maintenance—Propriety—Conditions—Arrears of maintenance—Date from which, to be awarded—Principles applicable to—Residence in and maintenance in husband's establishment—Arrears for period of—Widow's right to

The amount to be allowed to a Hindu widow for her maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of Law in arriving at a fixed sum

The fact that the sum awarded for maintenance to one widow of a family in a previous litigation a good many years before bore a certain relation to the then net income of the family cannot be suggested as a principle of law to be applied to the decision of the amount to be allowed for maintenance to another widow of the same family

Ordinarily such sum should be fixed for a widow's maintenance as would enable her to live as far as might be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime The principle of assessing the maintenance might be different in cases in which the past mode of life of the widow has been demonstrably on a penurious and miserly scale or on a quite extravagant scale having regard to the total income of the husband.

The discretion exercised in fixing the amount to be awarded to a Hindu widow for maintenance when agreed to by two Indian Courts or even by one, should not be lightly interfered with by the Privy Council

In a suit by a Hindu widow for maintenance, the Courts below found that the then net income of the estate was a certain amount, and awarded the widow maintenance at a certain rate on the basis thereof They also found that two large items of the estate, which were not taken into account in arriving at the net income, were the subject-matters of two suits by and against the estate, and if those litigations ended favourably to the estate, its net income would be substantially increased The High Court by its decree accordingly reserved liberty to the widow to apply in her suit itself for enhancement of maintenance in the event of the said litigations ending favourably to the estate, and decided that a fresh suit for the purpose would not be necessary

Held, that the High Court's treatment of the position was sound in principle and advantageous in procedure

A Hindu widow is, except when she does so for unchaste purposes, or where there is a direction in her husband's will that she is to be maintained in the family house, within her legal rights in leaving her husband's residence and choosing another for herself In such circumstances, that is to say, in the ordinary case, it is no part of the duty of a widow choosing her own residence to furnish excuses which will satisfy a Court of Law that she has made a judicious choice. And she does not forfeit her right to maintenance by such a change of residence

Except possibly in the extreme case of a widow being kept under circumstances of extreme penury and oppression, a widow is not entitled to arrears of maintenance from the date of her husband's death and including the time that she resided in her husband's establishment and accepted maintenance in

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fact and in kind from her husband's relations To give her arrears only from the date of the decree would be an inadequate recognition of her right to maintenance It is indeed an inversion of the correct procedure in the case of a continuing right In any view the right could not be post-dated from the institution of the suit onwards This, besides being erroneous in law, would be a daily temptation to delay in litigation by postponing the date of liability to that of final decree. When a widow's receipt of maintenance in residence in her husband's establishment does not cease contemporaneously with her institution of a suit for maintenance, it is the duty of the Court to consider the whole circumstances of the situation in pronouncing a decree for arrears

In a suit by a Hindu widow who had, from the date of her husband's death, resided in and been maintained in her husband's establishment and had subsequently left it and ceased to be maintained by it for, *inter alia,* arrears of maintenance, *held,* on an application of the above principles, that she was entitled to arrears from the date on which she left her husband's house, and not from the date of her husband's death, as claimed by the widow, or merely from the date of suit, or from the date of decree

Appeal No. 128 of 1927 from a decree of the High Court, Patna (Das and Adami, JJ.), dated the 13th May, 1926, which with certain modifications affirmed a decree of the Court of the Subordinate Judge of Darbhanga, dated the 10th March, 1924.

The material facts of the case are stated sufficiently in their Lordships' judgment.

De Gruyther, K.C. and *Dube* for appellant.

Dunne, K.C. and *Hyam* for respondents.

5th March, 1929. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a judgment and decree dated the 13th May, 1926, of the High Court of Judicature at Patna, which affirmed a judgment and decree of the Subordinate Judge of Darbhanga, dated the 10th March, 1924

The appellant is the widow of Babu Ekradeshwar Singh, a descendant in the junior line of the Darbhanga family. Babu Ekradeshwar was twice married. He died on the 21st October, 1916, survived by the appellant, his second wife, and a daughter by her, and by the respondents 1, 2 and 3, his sons by his first wife, who had predeceased him. He was also survived by respondents 4 and 5, his grandsons, who were the sons of respondent No. 2.

The appellant, Ekradeshwari, who was sole widow, continued to live in the family house for four or five years after her husband's death. She complains in this action that the style of life to which she had to submit during that residence was penurious and inadequate. Upon leaving her husband's house she went to stay with her father with whom she still lives.

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In the year 1917 a suit was instituted by the respondent No. 1 against the respondent No. 2 for partition of the estate left by their father and a compromise was arrived at. The position of the family had been brought before the Court of the Subordinate Judge at Bhagalpur with a view to having the maintenance of the appellant fixed. The narrative in the Judge's order of 23rd February, 1918, is as follows:—

"The parties to the contest have put in a petition of compromise, which was filed on the 26 1 18 This being a prayer on their behalf as to the maintenance for their step-mother being fixed by the Court, the petition could not be considered as a notice upon the lady had to be given. It appears that she does not appear, though requested to do so This being so, I cannot judicially but do or fix her maintenance in her absence. I therefore refuse the prayer of the parties in this respect As for the suit (that is, the suit for partition) I decree in the terms of the petition."

It may be doubtful whether the appellant was fully apprised of, or understood, these proceedings, and it is clear that no maintenance was either asked for by her or fixed for her in that suit, and that she continued her residence and maintenance as before. She, however, as already mentioned, did ultimately leave the family house, and took up her abode with her father, who maintains this daughter in his household with the rest of his family.

The property thus partitioned was heavily encumbered with debts There is no question however that it remained liable to the widow's claim for maintenance. Shortly after taking up residence with her father the appellant raised this suit.

In view of the ascertained facts of the case the demands made in the suit were of an unusually serious character. A maintenance allowance was asked at the rate of Rs. 18,000 per annum. Arrears of maintenance were asked from the date of her husband's death, amounting to Rs. 99,000. A further sum of Rs. 15,000 was demanded for the cost of building a house for her separate use and occupation. Finally, a demand was made for Rs 13,170, the price of jewellery and ornaments contained in a list which was appended to the plaint. These were alleged to have belonged to the plaintiff and to be wrongfully detained by the defendants.

In the course of the proceedings the case as to the last item entirely failed Both Courts agreed that it had not been made out in fact. They further agreed that the separate item for the cost of building a separate house for herself failed.

There remain, however, the important claims as to maintenance, and these are the questions which alone were submitted to the Board upon appeal, the points being, first, as to the amount

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of maintenance allowance, and, secondly, as to arrears, that is to say, the date from which the allowance should run. As to the amount of the allowance there are certain concurrent findings of the Courts below. The Subordinate Judge found that the gross income of the estate was Rs. 1,50,000 per annum, and that the net income was Rs. 33,000 per annum. Both of these findings were concurred in in fact by the High Court. One of the debit items was Rs 66,000 due under mortgage to the Maharaja of Darbhanga. It appears clear that this mortgage originated in debts contracted very largely in the time of the appellant's husband. The subject of that item is, however, a matter of litigation between the respondents and the Maharaja of Darbhanga. Should that litigation end successfully, that is to say, in favour of the estate now in question, arrangements are made in the decree of the High Court for reconsideration of the amount of maintenance allowance in respect of the estate being thus incremented.

Their Lordships approve of the matter being thus dealt with by the High Court. As expressed in their judgment the matter stands thus:—

> "I may point out that a suit has been instituted by the Maharaja of Darbhanga to enforce the mortgage bond for Rs 5¼ lacs and that the defendants are contesting that suit If the defendants should succeed in defeating the claim of the Maharaja then the plaintiff will have liberty to apply for increase of her maintenance. The defendants have also a large claim as against a Marwari gentleman If they should succeed in realising their claim the plaintiff will have similar liberty to apply for increase of her maintenance. We direct by the consent of the parties that she would be entitled to secure an increase of her maintenance by an application to the Subordinate Judge of Darbhanga and that it will not be necessary for her to file a fresh suit."

In the view of the Board this treatment of the position is sound in principle and advantageous in procedure.

Their Lordships accordingly see no reason in the case for interfering with the statement of the net income arrived at below. It is Rs. 33,000. The demand of the appellant for a maintenance allowance of no less than Rs. 18,000 seems thus entirely unreasonable. An attempt to excuse it was made by a reference to an allowance made a good many years ago (in the lifetime of Rajeshwari Bahuasin) to the wife of Janeshwar Singh. It may or may not be possible to interfere with that allowance, but it itself constitutes a severe burden upon the estate in its now impoverished condition, and it forms no precedent either in fact or in law for the present claim of the appellant.

The second argument was that upon an investigation of the figures in the previous litigation just referred to the sum of Rs. 15,000 appeared to bear the relation of one-fourth to the then net income, and this was suggested as a principle of law to be now applied. Their Lordships must definitely negative such a suggestion. It is no part of the maintenance law of India. In some cases, if applied, it would enlarge the allowance made far beyond any reasonable conception of maintenance as such. In other cases it might depress the allowance beyond what was a reasonable maintenance item.

The ground, however, for attack upon the concurrent findings of the Courts below, is said to be some error of legal principle, and (somewhat inconsistently with this) it was complained that it was difficult to find any legal principle upon which the maintenance allowance had been fixed. Upon this last their Lordships observe that it may be so, for the simple reason that maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties. In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of Law in arriving at a fixed sum The discretion exercised in making this induction when agreed to by two Indian Courts or even by one, should not be lightly interfered with. As observed by Sir Montague Smith in the case of *Sreemutty Nittokissoree Dossee* v. *Jogendra Nauth Mullick*[1]:

"Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at"

Their Lordships, however, do not wish to leave this part of the case as having been decided on grounds which are barren of principle. The Courts below fixed the maintenance allowance of the appellant at Rs. 4,200 per annum, and the learned Subordinate Judge in doing so, says this:—

"This sum, I think, would enable the lady to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime."

1. (1878) L.R. 5 I.A. 55.

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That is as near to principle as can be got in such cases, and, with the addition to be presently noted, their Lordships entirely approve of that view. The addition is this: that there may be circumstances in which the past mode of life of the widow has been demonstrably on a penurious and miserly scale, or on the other hand, on a quite extravagant scale, having regard to the total income of the husband. But if, as may be readily assumed, in such a case as the present, the scale was suited to his own position in life, that is a sound point from which to start the estimate. In the view of the Board the estimate made as applicable to present circumstances in this family should not be interfered with.

Up to this point in the discussion the appeal fails.

There is, however, a further point in the case, namely, arrears, in other words, the date from which a maintenance allowance should start. There are four possible periods, namely, first from the death of the deceased husband (21st October, 1916), that is to say, even during the residence on the alleged limited style of life in his former establishment; second, from the date of the change of the appellant to her father's residence, a period which is variously stated as from the end of 1920 to the end of 1921. To this variation subsequent reference will be made. Third, from the date of suit, namely, 23rd April, 1922, and fourth, from the date of decree, namely, 10th March, 1924

Their Lordships are clearly of opinion that to start the maintenance at the last-mentioned date as has been done in the Court below, would be an inadequate recognition of the widow's right to maintenance. It is indeed an inversion of the correct procedure in the case of a continuing right. In any view the right could not be post-dated from the institution of the suit onwards. This, besides being erroneous in law, would be a daily temptation to delay in litigation by postponing the date of liability to that of final decree.

Payment from the date of suit being thus granted the question is whether arrears prior to that date are exigible. In the Board's opinion such arrears, if they truly exist, fall within the range of the widow's right to maintenance. When a widow's receipt of maintenance in residence in her husband's establishment ceases contemporaneously with her institution of a suit for maintenance the point almost settles itself. When, however, as is the case here, there is no such exact concurrence of dates, it

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is the duty of the Court to consider the whole circumstances of the situation in pronouncing a decree for arrears.

In the present case the Court is met by a demand by the appellant of a somewhat peculiar kind. It is to the effect that a decree should include arrears of maintenance not only from the date when she left her late husband's house to reside with her father, as she has since done, but should date from her husband's death and include the time that she resided in her husband's establishment. The result of conceding this would be a kind of cross account: on the one side maintenance quantified in money as from the husband's death; on the other side a credit being given for maintenance as actually received with its incidental costs. In the opinion of the Board there is no legal justification for such a treatment of the case and the argument of the appellant fails. While their Lordships do not exclude an extreme case, say, of a widow being kept under circumstances of extreme penury and oppression, such a case must be treated as most exceptional, and would require unimpeachable proof. It is sufficient to say that nothing like that has been established in the present case.

On the other hand, the argument presented for the respondents and, indeed, the decision of the Court of Appeal, seem to be based upon the assertion that it is the law of India that a Hindu widow has in the ordinary case no right of maintenance if she chooses to change from her husband's residence and choose another for herself. With much respect to the Court of Appeal the Board is unable to accept this view.

On the authorities it is, of course, true that if that change of residence is made for unchaste purposes it is a sufficient answer to the demand to offer her the shelter of the old home. But this is in no respect any such case. It is a simple case of a Hindu widow from motives which cannot be impeached on the ground stated, leaving her old residence and preferring the shelter and protection of her father's home. In the opinion of the Board such action was within her legal rights. She was only 24 years of age, and one cannot peruse the authorities or have a knowledge of Indian life, without understanding that such a change might be made from a sense of propriety and from the best of motives. But even so the point is not one of motives but of right.

It is now necessary to see what is the foundation of the judgment of the Court below. It is contained in a single

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sentence in the judgment of the High Court as follows:—

"In regard to her claim for arrears of maintenance we think that there is no ground for allowing that claim It is not suggested that she has incurred any debts in maintaining herself and we can find no excuse for her leaving her sons and going to reside with her father"

With much respect to the High Court their Lordships think that a judgment in these terms contravenes the long and well-settled law of India. It makes this case one of widespread importance, and the Board thinks it accordingly right to note the outstanding case-law on the subject.

This is not an instance in which there was any direction in the husband's will that she was to be maintained in the family home. In such circumstances, that is to say in the ordinary case, it is no part of the duty of a widow choosing her own residence to furnish excuses which will satisfy a Court of Law that she has made a judicious choice. The authorities on that subject are clear for at least three-quarters of a century, but only one or two need be cited.

In 1854 Peel, C J., of Bengal, delivered an important and leading judgment, reported in the *Vyavastha-Darpana,* page 362. That very learned Judge states that the Court has examined closely into the state of the authorities and the law on the subject. He quotes from the case of *Ujjal-mani Dasi* v. *Joy-gopal Pal Choudhuri and others* (1st June, 1848), as follows:—

"It was not pretended that she had withdrawn herself for unchaste purposes She was only 14 at the death of her husband; his brothers were young men, and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death, therefore, it appears quite clear from the answers given by the *pandits* that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them in order to put herself under her mother's protection"

He thereafter states the proposition thus, in the language of the *pandits* adopted by the Privy Council:—

"If a widow from any other cause but unchaste purposes ceased to reside in the husband's family and took up her abode in her parents' family her rights would not be forfeited"

In a later passage in the same judgment he says:—

"We have examined the texts of the ancient law, and we think they bear out the opinions of the *pandits* in the case before the Privy Council. The texts say as to maintenance, forfeiture is incurred by unchaste life but they do not say that it is incurred otherwise There are many duties enjoined to women in the text of a moral or religious nature,

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Lord Shaw.

the violation of which would never have involved any forfeiture. Forfeitures are not to be extended by construction The duty to reside with the family of the deceased husband is not enjoined for the sake of thrift."

The decision was highly approved by this Board in *Rajah Pirthee Singh* v. *Ranee Raj Kower*.[2] In that case Sir Barnes Peacock again reviewed the authorities up-to-date, and concludes as follows:—

"It therefore appears that a Hindu widow is not bound to reside with the relatives of her husband, that the relatives of her husband have no right to compel her to live with them, and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes."

These principles have never been gone back upon or modified. They are still the law of India.

It remains accordingly only to fix the date from which the maintenance allowance should run. The appellant having remained in her late husband's home, and having, as she had, a right to do, during that period accepted maintenance in fact and in kind, and she having thereafter, as was also within her legal right, changed her residence and gone to live with her father, what was the date of that change? The evidence upon that subject is far from clear. It appears to be established that she left by the family car on a visit to her father to attend the *sradh* ceremonies of her deceased mother. When there she made up her mind to stay on, and she has done so ever since. The Board is of opinion that this happened in the end of 1921, and that accordingly maintenance on the scale fixed by the Court below should run not from the date of decree, as found by the Court of Appeal, nor from the date of suit in April, 1922, but from 1st January, 1922.

Their Lordships will humbly advise His Majesty that the decree appealed from be affirmed subject to the modification that the maintenance allowance be granted from 1st January, 1922. There will be no costs in the appeal.

Solicitors for appellant: *Pugh & Co.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

Appeal allowed and Decree of the High Court modified.

K.J.R.

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2. (1873) I.A. Supp. Vol. 203.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

S. V. L. L. Lakshmanan Chettiar .. *Assessee**

v.

The Commissioner of Income-tax, Madras .. *Referring Officer.*

F. B.
Lakshmanan Chettiar
v.
The Commissioner of Income-tax, Madras.

Indian Income-tax Act (XI of 1922), Section 4—Money-lender carrying on business within British India—Loan on Tavanai *system in the course of such business to persons outside British India—Interest due and unpaid at the end of* Tavanai *period but not actually received—If taxable*

Where a Nattukottai Chetty carrying on money-lending business in British India lends money, in the course of such business, to persons outside British India on the *Tavanai* system, the interest due and unpaid at the end of each *Tavanai* must be taken into account in assessing him to income-tax, although it was not actually received in cash

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to refer the following case for the opinion of the Hon'ble the Judges of the High Court under Section 66 (2) of the Income-tax Act, 1922.

2. The petitioner is a Nattukottai Chetty, resident at Devakottai in the Ramnad District, within the jurisdiction of the Income-tax Officer, First Circle, Karaikudi. He carries on a money-lending business at Devakottai and is a partner in some other firms in British India.

3. For the assessment of the year 1927-28 based on the accounts of the Tamil year Akshaya (1926-27) the petitioner returned an income of Rs. 3,430 from his business at Devakottai. The Income-tax Officer who examined his accounts found that he had not taken credit for the interest that had fallen due in the year of account on loans advanced by him to members of his own community on what is known as the *Tavanai* system. The interest on such loans due by persons in British India amounted to Rs. 2,241 and that due by customers in Ceylon and the Strait Settlements amounted to Rs. 5,578. The Income-tax Officer added these as well as other items omitted by the petitioner and fixed the taxable income of the business at Devakottai at Rs. 13,658.

4. The petitioner appealed to the Assistant Commissioner objecting to the assessment of the sum of Rs. 5,578 on the ground

*O.P. No. 126 of 1928. 14th March, 1929.

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that the interest on sums lent to persons in Ceylon and the Strait Settlements accrued and arose outside British India and that it could not be taxed as income unless and until it was actually received in British India. The Assistant Commissioner overruled his objection and upheld the assessment.

5. The petitioner has required me under section 66 (2) of the Income-tax Act to refer certain questions of law for the decision of the High Court. The question arising on the facts of the case is the following and I refer it for the opinion of the High Court:—

> "Whether the sum of Rs 5,578 can be taxed under Section 4 of the Income-tax Act as income accruing or arising or received in British India during the year of account, Akshaya."

6. The loans in question were advanced in the course of the petitioner's business at Devakottai and it is not disputed that they are repayable in British India. The interest on such loans is not a profit or gain arising without British India as has already been held by the Madras High Court in the case of *A. T. K. P. L. S. P. Subramaniam Chettiar* (Referred Case No. 8 of 1926).

7. The next question is whether the petitioner can be said to have received the interest on these loans during the year of account. The distinguishing feature of *Tavanai* loans is that at the close of each period the interest due, if payment in cash has not been demanded by the creditor, is added on to the principal sum lent, becomes merged in it, and begins to bear interest as part of such principal sums. In effect, therefore, the interest is received at the close of each period and lent again to the original borrower and the receipt should be exhibited as such even in an account maintained on a cash basis, *i.e*, as a record of actual receipt. The fact that the creditor did not make the necessary adjustment in his accounts at the end of each *Tavanai* cannot alter the nature of the transaction. The sum of Rs. 5,578 represented interest for *Tavanais*, which fell within the year of account and must be taken to have been received as it became due. It will be noted that the Income-tax Officer included in the assessment the interest due on *Tavanai* loans advanced to persons in British India even though the petitioner had not shown it as a receipt during the year of account and that the petitioner did not at any stage object to this procedure. The fact that the loans in question were made to persons outside British India does not alter the position. I am therefore of opinion that the Income-tax Officer rightly taxed the sum of Rs. 5,578 as income received in the year of Akshaya.

R. Kesava Aiyangar for Assessee.

M. Patanjali Sastri for Referring Officer.

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The Court delivered the following

JUDGMENT:—The petitioner is a Nattukottai merchant residing at Devakottai in the Ramnad District where he carries on a money-lending business. In the course of the business he lent moneys to persons in Ceylon and Strait Settlements on what is known as the *Tavanai* system. The Income-tax Officer assessed the petitioner on the footing that interest in respect of such loans must be taken into account in assessing the petitioner for the year Akshaya. Objection was taken that interest on sums lent to persons outside British India cannot be taxed as income arising within British India unless and until they are received in or brought into British India and that as the petitioner did not actually receive interest on the loans he could not be taxed simply because he was getting compound interest. These objections were overruled but on the request of the petitioner the following question was referred to us for decision:—

"Whether the sum of Rs. 5,578 can be taxed under section 4 of the Income-tax Act as income accruing or arising or received in British India during the year of account, Akshaya"

It was asserted by the petitioner during the enquiry before the Income-tax Officer that the moneys were lent on the ordinary *Tavanai* system and we must take it that the usual incidents of a loan with an agreement to pay *Tavanai* interest apply. Under such a system interest is agreed to be paid at certain periods and in default of such payment interest remaining unpaid becomes part of the principal and the whole sum carries interest at the rate agreed upon. Debits and credits are made in the accounts on this footing and the amount is carried forward at the end of each *Tavanai* period The effect is that at the end of each *Tavanai* period the interest due and unpaid at the end of each *Tavanai* is treated as having been received and added to the principal and re-lent on the rate of *Tavanai* interest agreed upon. In *Narayanan Chetty* v. *Suppiah Chetty*[1] it was held by Wallis, C. J. and Krishnan, J., that in such cases interest unpaid and added to the principal is to be treated as a fresh deposit. In O. P. No. 129 of 1928, *T. P. Pethaperumal Chettiar* v. *Commissioner of Income-tax*, which was a reference under the Income-tax Act, Coutts Trotter, C. J., Beasley and Mackay,

1 (1920) I.L.R. 43 M. 629: 38 M.L.J. 437.

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JJ., were of opinion that under a loan of *Tavanai* contract where at the close of each period the interest due, if payment in cash has not been demanded or paid, is added to principal sum lent and becomes merged in it and begins to bear interest as part of such principal; that means that interest is to be treated as having been paid and received and is added to the deposit itself to carry interest. We may in this connection also refer to the observations of Napier and Krishnan, JJ, in *The Secretary to the Board of Revenue, Income-tax, Madras* v. *Arunachalam Chettiar*[2] as to when interest will, though not actually received, be deemed to have been received. Reference has been made by petitioner's advocate to *The Board of Revenue* v. *Pydah Venkatachalapathy Garu*[3], but that case went on the ground that there was nothing in the documents or evidence to show that there was any discharge of the interest due or constructive receipt of the sum. We are of opinion that the petitioner must for the purposes of assessment to income-tax be deemed to have received interest though it was not actually paid in cash.

The next question is whether he received it in British India within the meaning of section 4 of the Income-tax Act. Under section 4 profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received and brought. The explanation is to the effect that the mere fact that such profits are taken into account in the balance sheet prepared in British India will not bring the case within this Section.

In *The Commissioner of Income-tax, Madras* v. *Subramaniam Chettiar*[4] it was held that where a person who adopted the mercantile basis in his account and who carried on business in Rangoon and Penang advanced a sum of money from the Rangoon funds to the Penang business and credited interest on the advance in the Rangoon business though no amount was actually received from Penang, the interest in question was not profit or gain arising outside British India but was income which properly accrued or arose within British India within sec-

2 (1920) I.L.R. 44 M 65 at 92 and 99: 39 M.L.J. 649 (S.B.).
3. (1922) 16 L.W. 174 (F B)
4 (1927) I.L.R. 50 M 765: 53 M.L.J. 379 (F.B.)

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tion 4 (1) of the Income-tax Act. Mr. Kesava Aiyangar for the petitioner wanted to canvass the correctness of this decision but we see no ground to dissent from the view taken by the learned Judges.

In the present case it is not suggested that the petitioner was carrying on a separate or a branch business in Colombo and the Strait Settlements. He is a money-lender carrying on business in British India and in the course of such business lends money to persons outside British India. It is therefore unnecessary for us to consider the cases cited which had reference to business having branches outside British India.

Reference was made to *Gresham Life Assurance Society* v. *Bishop*[5], *Farmer* v. *The Scottish Widows' Fund Life Assurance Society*[6] and *Scottish Provident Institution* v. *Farmer*[7], where it was held that actual receipt of interest or profits is necessary and that a mere inclusion of the amounts in the balance sheet or accounts is not sufficient to make income received in foreign countries taxable The explanation to section 4 embodies the rule laid down in the decisions cited. In the present case we are of opinion that the explanation to section 4 has no application as for the reasons given by us we think that there has been a receipt of the interest.

We are of opinion that the petitioner has been rightly assessed and answer the reference in the affirmative. The assessee will pay the Income-tax Commissioner's costs Rs. 250

Reference answered in the affirmative.

N. S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORDS SHAW, DARLING, ATKIN, TOMLIN AND SIR LANCELOT SANDERSON.

Venkatakumara Mahipati Suryarao Bahadur Garu, Rajah of Pittapur .. *Appellant**

v.

Secretary of State for India in Council .. *Respondent.*

P. C.

Rajah of Pittapur v. Secretary of State for India.

Grant—Minerals—Grantee's right to, under grant of tenure by Zemindar —Presumption—Onus of proof—Evidence—Purchaser from grantee—Leases by—Reservation of right to minerals in—Admissibility in evidence of fact of—Civil Procedure Code, S. 100—Erroneous finding of fact—

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*P.C. Appeal No 72 of 1927. 15th March, 1929

5. (1902) A.C. 287. 6. 5 Tax Cases 502.

7. 6 Tax Cases 34.

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Rajah of Pittapur v. Secretary of State for India.

Interference with—Jurisdiction—Privy Council appeal from decree in Second Appeal—Findings of fact of first appellate Court—Interference with—Jurisdiction of Privy Council—Grant in India—Interest passing under—Question as to—English Law rules as to real property—Inapplicability of.

When a grant is made by a Zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

Held, accordingly, in the case of an estate originally held under a grant from a Zemindar subject to a fixed annual rent and an obligation to provide a military force, that there was no presumption that the underground rights passed by the original grant

The rules of English Law as to real property in England can afford no guidance as to what has passed under an Indian grant.

Where the question was whether the underground rights in an estate passed under a grant thereof by a Zemindar, *held,* that the fact that minerals were in terms reserved in leases to tenants granted by purchasers of the estate from the grantee could not be evidence that the underground rights passed under the grant.

No second appeal will lie except on the grounds specified in S. 100, Civil Procedure Code. The High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be

In an appeal from the decree in a second appeal, the Privy Council has no jurisdiction to review or modify the findings of fact arrived at by the first appellate Court.

Appeal No. 72 of 1927 from a decree of the High Court of Judicature at Madras.

The material facts of the case appear sufficiently from their Lordships' judgment.

The only question for consideration on the appeal to the Privy Council was whether the appellant, owner of the villages in suit, had the mineral rights therein.

In the High Court, reliance was placed by the plaintiff upon the then recent decision of the Privy Council in *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj,*[1] which, it was unsuccessfully contended, modified the force of the previous decisions relating to mineral rights.

The plaintiff appealed.

De Gruyther, K.C. and *Narasimham* for appellant argued that there was no reservation of the mineral rights to the grantor at any time.

Dunne, K.C. and *K. Brown* for respondent:—There is no evidence whatever establishing any grant of minerals. The appellant has to show that the right to the minerals passed.

[*Lord Shaw.*—There is nothing in the language used in the grant to show that there was any reservation of the minerals.]

1. (1924) L.R. 52 I.A. 109: I.L.R. 4 Pat. 244: 48 M.L.J. 328 (P.C.).

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The State has a right to the minerals, unless the party claiming them can show a grant. The appellant has to establish a grant by which the minerals vested in him.

[*Lord Tomlin*.—The question is whether the principle laid down in *Sashi Bhushan's case*,[2] that an express grant must be shown, applies to the present case.]

[*Sir Lancelot Sanderson*.—The question must be decided according to the terms of the original grant. The Lower Appellate Court distinctly finds that there was a grant.]

Refers to the Fifth Report, p. 163, Vol. 11 (Madras).

De Gruyther in reply refers to the Bengal Regulation VIII of 1793, S. 14, as to who are Talukdars. In India the man who pays the revenue is the proprietor of the soil.

15th March, 1929. The judgment of their Lordships was delivered by

Lord Tomlin.

LORD TOMLIN.—The appellant in this case who is the plaintiff in the suit, and will be hereinafter referred to as the plaintiff, is appealing against a decree, dated 31st March, 1925, of the High Court of Judicature at Madras whereby the plaintiff's suit was dismissed and the plaintiff was ordered to pay certain costs.

The plaintiff as successor-in-title of his father holds 27 villages, formerly part of an estate known as the Totapalli estate situate in the Godavari District in the Northern Circars of Madras. These villages were purchased in 1879 by the plaintiff's father from the then holder and Mansabdar of the Totapalli estate.

In the years 1913 and 1915 the Tahsildar of Peddapur collected from tenants of the plaintiff in two of the 27 villages royalties or penalties for the removal of gravel and stone from hills within the boundaries of such two villages. He did so on the footing that the underground rights in the villages belonged to the Government.

Thereupon the plaintiff launched in the Court of the District Munsif of Peddapur a suit against the defendant, the Secretary of State for India in Council claiming a declaration of his title to the underground rights in his villages formerly part of the Tottapalli estate. He also asked an injunction to restrain interference with his rights and a refund of the amount collected from his tenants. The defendant denied the title of the plaintiff to the underground rights alleging that the Government retained the right to resume (*i.e.*, to reassess) the Totapalli estate

2. (1916) L.R. 44 I.A. 46: I.L.R. 44 C. 585: 32 M.L.J. 245 (P.C.).

and that the underground rights were therefore vested in the defendant-respondent The substantial issue between the parties is the title to the underground rights.

The Mansabdar of the Totapalli estate admittedly transferred to the plaintiff's father in 1879 all his interest in the 27 villages. It was open to the plaintiff to show either that the interest of the Mansabdar transferred in 1879 included the underground rights or that the plaintiff's father or he himself subsequently acquired them. In fact, in the first instance, he framed his claim on the footing that the underground rights passed to his father in or about 1883 by reason of the Government having at that time resumed the villages and enfranchised them in favour of his father.

This point is raised by para. 3 of the plaintiff's filed plaint in the following terms:

"The plaintiff is the owner of Nellipudi, Meraka Chamavaram and some other villages in the Totapalli estate as per the plaint schedule The underground rights in the said villages had become absolutely vested in and been enjoyed by plaintiff and his predecessors-in-title and the said villages were purchased from the then Mansabdar by plaintiff's father in or about 1879. They were subsequently resumed by Government and enfranchised in plaintiff's father's favour and quit rent imposed on them."

As will be seen from the succeeding narrative, the plaintiff subsequently changed his ground more than once.

On 18th December, 1916, the District Munsif pronounced judgment in the plaintiff's favour so far as his title to the underground rights was concerned, and gave him a declaration accordingly, but did not grant him any injunction and rejected his claim for a refund of the royalties or penalties which had in fact been paid not by him but by his tenants.

The District Munsif appears to have held that the alleged enfranchisement did not enlarge the appellant's rights but that the title to the Totapalli estate rested upon an ancient grant, which had not been produced, and that by virtue of a general rule to the effect that the grantor must in the absence of evidence to the contrary be taken to have parted with all his rights, the underground rights had passed by the grant and were therefore vested in the plaintiff.

An appeal was taken to the Subordinate Judge, who, on 17th December, 1917, also pronounced judgment in the plaintiff's favour. He appears to have held that there was an original service grant of the estate which must be presumed to have carried the underground rights and further that the plaintiff was entitled to the underground rights by virtue of the alleged enfranchisement. He, therefore, confirmed the decree

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of the Lower Court with the addition of an injunction to which he considered the plaintiff entitled.

The defendant appealed to the High Court of Judicature at Madras. On 7th March, 1919, the Court set aside the decisions of the Lower Courts. It remanded the suit to the District Munsif for re-admission and re-trial, and directed the trial of an additional issue, namely:

"Whether the suit village in the hands of the plaintiff's predecessors was subject to a burden of service or was in lieu of wages for service?"

From the judgments delivered in the High Court it appears that the Court took the view that the Subordinate Judge had decided the case upon the basis that there had been an enfranchisement by the Government which carried the underground rights to the plaintiff's father, but that in fact what had taken place had not amounted to an enfranchisement at all. The learned Judges, however, directed the trial of the further issue because the plaintiff's counsel had presented to them an argument to the effect that apart from the alleged enfranchisement his client's predecessors-in-title had always held the estate subject to a burden of service and not merely in lieu of wages for service. This fact, if established, would (he had contended) lend strength to the plaintiff's claim to the underground rights. The suit was accordingly re-tried by the District Munsif. On 21st June 1920, he again gave judgment in the plaintiff's favour, holding that the Totapalli estate was held only burdened with service and was not held in lieu of wages for service, and that the underground rights were, therefore, in the plaintiff. The District Munsif's view seems to have been that the holding of the villages was first and the imposing of the burden of service subsequent.

On appeal the Subordinate Judge, on 12th December, 1921, confirmed the District Munsif, holding that the estate was enjoyed under a grant from the Zamindar of Peddapur, subject to the obligation of rendering some service and paying a quit rent, and that such a grant carried the underground rights.

The suit was again taken by the defendant to the High Court of Judicature at Madras. The appeal was, on 1st May, 1925, allowed, the learned Judges holding that in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

It is to be observed that in the High Court on the second appeal the plaintiff for the first time put forward a new contention that the Mansabdar of the Tôtapalli estate was originally a chief in a position analogous to a Poliagar in the South

of the Presidency and as such entitled to the underground rights. This contention was rejected by the learned Judges of the High Court on the grounds that it had not been raised in the Lower Courts and that there was no evidence to show any similarity between the tenure of the Totapalli estate and that of an estate held by a Poliagar.

It is against this judgment that the plaintiff now appeals.

The history of the Totapalli estate prior to the early part of the 19th century is not free from obscurity. No grant of the estate has been produced. The material placed before the Lower Courts consisted of (*a*) Mr. James Grant's Political Survey of the Northern Circars, written about 1785 and annexed to the Fifth Report of the Select Committee on the Affairs of the East India Co., (*b*) Morris's account of the Godavari District, published in 1868 under Government authority, (*c*) "The Godavari Gazetteer," a Government publication of 1907, (*d*) the Government documents relating to the transactions of 1881-1883, which are printed at pp. 89-100 of the record, and (*e*) the extracts from the statement of a former Mansabdar of Totapalli printed in the course of the reports of the case of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*[3]

From this material certain facts emerge as to which there is no dispute, namely, (1) that in or about the year 1785 the Mansabdar was paying a fixed annual sum to the Zamindar of Peddapur and was under an obligation to furnish him with a military force of 700 peons when called upon to do so; (2) that some time prior to the end of the 18th century the Zamindar resumed certain villages forming part of the estate to satisfy his claims in respect of the annual sum; (3) that in 1802 there was a permanent settlement by the Government of Madras of the Zamindary of Peddapur and that the annual sum receivable by the Zamindar from Totapalli was treated as an asset of the Zamindar; (4) that in 1847 the Government of Madras acquired the Zamindary of Peddapur at a sale for arrears of revenue; (5) that in 1859 the Government commuted the obligation of the Mansabdar of Totapalli to supply 700 peons for an annual payment of 6,500 rupees; (6) that the Mansabdar from time to time alienated certain other parts of the Totapalli estate as well as the 27 villages alienated to the plaintiff's father in 1879; and (7) that the Government's documents show that the Government regarded the Totapalli estate as a service

3 (1869) 13 M.I.A. 333.

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inam and dealt with it on that footing in 1881 to 1883 by making a settlement in respect of it which was expressly stated not to amount to a permanent settlement or enfranchisement.

Mr. Grant, in his survey of 1785, describes Totapalli as a small hilly country and a region of tigers. The obscurity of its early history may in part be due to its lack of importance.

At any rate their Lordships are of opinion that there is a definite finding by the Subordinate Judge to the effect that the estate was originally held under a grant from the Zamindar of Peddapur subject to a fixed annual rent and an obligation to provide a military force. After an examination of the materials placed before the Lower Courts (in the course of which their Lordships saw a full copy of the statement of the Mansabdar, extracts from which are printed in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*[3]) their Lordships are of opinion that there was before the Subordinate Judge evidence upon which his finding of fact could have been based.

Before their Lordships for the first time it has been urged by the plaintiff that the Mansabdars of Totapalli were originally independent chieftains not taking under any grant at all, and that the findings of fact arrived at by the Subordinate Judge should be reviewed and modified accordingly.

In their Lordships' opinion they have no jurisdiction in the circumstances of this case to embark upon any such review. Under the Civil Procedure Code no second appeal will lie except on the grounds specified in S. 100. Directly in point are the observations of Lord Macnaghten in *Mt. Durga Choudrain* v. *Jawahir Singh Choudhri*[4] in which he says:

> "It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be."

There remains then only the question whether the High Court of Judicature at Madras was right in holding that the underground rights did not pass in the absence of evidence of the inclusion of such rights in the grant found by the Subordinate Judge.

There was, in fact, no evidence that the grant included the underground rights or that the minerals had ever been work-

3. (1869) 13 M.I.A. 333

4. (1890) L R 17 I A. 122 at 127: I.L.R. 18 C. 23 (P.C.).

ed by the Mansabdars of Totapalli or by any of their alienees. The fact that minerals were in terms reserved in leases to tenants granted by the plaintiff and his father cannot in their Lordships' opinion be evidence that the underground rights passed from the Zamindar of Peddapur under the original grant to the Mansabdar of Totapalli.

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The Lower Courts based their conclusion that the underground rights passed by the original grant upon a presumption that in the absence of any evidence as to the terms of the grant the grantor passed all that he had to the grantee.

In their Lordships' opinion no such presumption is admissible. Such a presumption would be contrary to many decisions of their Lordships' Board in which it has been from time to time pointed out that the rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant.

The principle to be applied to the present case is in their Lordships' judgment to be found stated by Lord Buckmaster in *Sashi Bhushan Misra* v. *Jyoti Prasad Singh Deo*[2] where, referring to earlier decisions, he says:

"These decisions therefore have laid down a principle which applies to and concludes the present dispute They establish that when a grant is made by a Zamindar of a tenure at a fixed rent although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect"

In the result therefore their Lordships are of opinion that the judgment of the High Court of Judicature at Madras was right and that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Douglas, Grant & Dold.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE REILLY.

The Corporation of Madras .. *Appellant*

v.

Messrs. Spencer & Co., Ltd., Mount Road, Madras .. *Respts.*

Corporation of Madras v. Messrs. Spencer & Co., Ltd., Madras.

Madras City Municipal Act (IV of 1919), S. 365 (2)—Licence fees leviable—If can be used as a power of taxation—Unreasonable levy of fee

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*O.S.A. No. 71 of 1928. 21st February, 1929.

2. (1916) L.R. 44 I.A. 46 at 53: I.L.R. 44 C 585: 32 M.L.J. 245 (P.C.).

Corporation of Madras v. Messrs. Spencer & Co., Ltd., Madras.

—*Power of Civil Court to interfere—Principles to determine whether licence fee is unreasonable—Costs—General rule as to—Interference by Appellate Court—When justifiable.*

There is a great difference between taxes and licence fees leviable under the Madras City Municipal Act of 1919, and the power given by S 365 (2) of the Act to the Council to levy licence fees cannot be used as a power of taxation Licence fees are leviable as compensation to the Corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which are licensed, and there must be some relation between these expenses and the amount of fees leviable The Civil Court has power to interfere with the levy of such fee in cases where the fee is unreasonable.

Kruse v. *Johnson*, (1898) 2 Q.B. 91 referred to.

Principles to be observed in determining whether the licence fee levied by the Council is reasonable or not pointed out by Reilly, J

Per Phillips, J—To justify the interference of an Appellate Court with the order of the Lower Court that costs should follow the result, not only should the Appellate Court be of opinion that there were circumstances which justified a departure from the usual order as to costs but it must be further satisfied that these circumstances were so exceptional that the Lower Court cannot have exercised its discretion judicially in ignoring them.

On appeal from the judgment of the Honourable Mr. Justice Beasley, dated the 19th day of April, 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 197 of 1927.

S. Rangaswami Aiyangar for appellant.

Vera Mockel with *O. T. Govindan Nambiar* instructed by *Messrs. Short Bewes & Co.* for respondents.

The Court delivered the following

Phillips, J.

JUDGMENTS. *Phillips, J.*—The only question for determination in this appeal is whether the action of the appellant, the Madras Corporation, in raising the licence fee for storing spirits from Rs. 25 to Rs. 200 was within its powers. Beasley, J., who tried the case has held that the increase in the fee is unreasonable within the meaning of the term as defined by Lord Russell, C.J., in *Kruse* v. *Johnson*,[1] and has directed refund to the plaintiffs, Messrs. Spencer & Co., of the excess amount paid by them. Mr. Rangaswami Aiyangar for the appellant now takes exception to this finding and says that the power to levy fees for licences under the Madras Act IV of 1919 is conferred on the Council and it is within their power to fix the fee at any figure they please. He contends that if they fixed it at a figure too high or too low, the tax-payer has two remedies, (1) by exercising pressure on the member of the Corporation for his ward with a view to getting the figure altered, and

1. (1898) 2 Q. B. 91.

(2) the correction of its own mistake by the Council; but he was not at first prepared to accept the dictum in *Kruse* v. *Johnson*[1] that the Court has power to interfere with bye-laws which are unreasonable. The definition given of "unreasonable" at p. 99 of the report of that case is as follows:—

> "If, for instance, they (i e, the bye-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men .. . "

Appellant's contention in the first place is that the fees fixed for licences for what are called dangerous and offensive trades which are leviable under the provisions of the Act are revenue in the same sense as the taxes which the Council is empowered to levy. When there is a question of what is the power of taxation conferred by Government on a public body, a very careful scrutiny is necessary to see that only powers specially conferred are exercised and that nothing further is added to them. In Part III of the Act which purports to deal with Taxation and Finance, Chapter V deals with Taxation and enumerates the several taxes which the Council is empowered to levy. Licences are dealt with in Part IV of the Act and are leviable under section 287. The power to levy fees for licences is given in the chapter on Procedure. There can be little doubt that there is great difference between taxes and licence fees. The fact that in sections 110 and 111 the levying of taxes is authorised but is stated to be by way of licence fees does to some extent support the argument that taxes and licence fees have something in common, but that a tax is not the same as a licence fee, is clear from the fact that no permission has to be obtained before the tax becomes payable and the tax is not paid for such permission, whereas the licence fee is payable in respect of a permission which is granted by the Corporation. I must confess that the words "by way of licence fee" in sections 110 and 111 are not very intelligible to me and I cannot think that the sections would be affected in any way by the omission of these words. Presumably the legislature intended to attach some meaning to these words, but nothing has been suggested in the course of these proceedings in explanation of the meaning. Whatever may be the meaning, I am satisfied that taxes cannot be treated as being in the same category as licence fees under the Act. The argument therefore that, when the Corporation is empowered to levy licence fees, it may do so solely for

1 (1898) 2 Q.B. 91.

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the purpose of revenue does not seem to me to be tenable. Beasley, J., has held that the fees are leviable as compensation to the Corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which are licensed and there must be some relation between these expenses and the amount of fees leviable. This was the view which was adopted by the Rangoon High Court in *Municipal Corporation of Rangoon* v. *The Sooratee Bara Bazaar Co., Ltd.*[2] With all respect, I think this is a very reasonable view to take and, although possibly the above is not the sole consideration which may be taken into account in fixing the amount of fee, it is the main consideration. The licence fees are in respect of what are called dangerous and offensive trades, that is to say, it is necessary in the interests of the city that the Corporation shall know where such trades are being carried on and shall be in a position to see that they are carried on in a proper manner without causing unnecessary nuisance to other people or danger to the public generally. That being so, it is clear that the Corporation must have power to raise money for the exercise of these powers, but it does not follow that the Corporation has the power to levy any sum it likes by way of licence fee in order to raise the revenue, and in fact it is conceded by Mr. Rangaswami Aiyangar that there must be some limit to the fee which can be imposed; but he is not prepared to suggest what that limit will be. If there is such a limit, there is good reason for holding in accordance with the principle of *Kruse* v. *Johnson*[1] that, if the fee is unreasonable within the meaning of Lord Russell's definition in that case, the Court has power to interfere with its levy. We have been referred to another case, *Institute of Patent Agents* v. *Lockwood*,[3] in which Lord Herschell, when dealing with the rules framed by the Board of Trade under the Patents, Designs and Trade Marks Act, 1888, which fixed a certain fee, in the course of his judgment observed:

> "I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a Court of Law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed"

If that remark is applicable to the present circumstances, it would follow that, as the Council has power to fix the fee, it is not within the province of this Court to interfere but there is a subsequent remark at page 357, namely,

1. (1898) 2 Q.B 91 2 (1927) I.L.R. 5 Rang. 212. 3 (1894) A.C. 347.

"I will say one word, however, before leaving this part of the subject, upon the point suggested that they involved something harsh or unfair as regards the respondent "

It is not reasonable to interpret that as showing that the learned Judge had the principle laid down in *Kruse* v. *Johnson*[1] in his mind, namely, that if there was something harsh or unfair in the rules, it may be that the court will interfere. The case is certainly no authority to the contrary and was not even cited in *Kruse* v. *Johnson*[1]. The question, therefore, before us is whether Beasley, J., was right in holding that the levy of this fee was unreasonable. Apparently from 1904 to 1924 the fee of Rs. 25 was fixed as the fee for storing spirits. Until that date the word "spirits" was interpreted as denatured spirits and the fee was levied for the storage of such spirits. In 1924 and 1925 the licence in its present form was granted for a fee of Rs 25 At the end of 1925 a proposal was made to raise it and we have the minutes of the proceedings of the Council from the 15th of December, 1925 to the 9th of March, 1926, when the Council finally fixed the fee at Rs. 200, changing the nature of the licence to one for arrack and for foreign liquors containing alcohol. From the notes of the then Commissioner it would appear that the Corporation resented the action of Government in collecting the Abkari revenue within the City and in not allowing the Corporation to utilise such revenue for themselves. As compensation the Government were paying a fixed sum annually to the Corporation. The Commissioner suggested that, as the Government insisted on the old conditions being adhered to, the power to levy a fee for storing spirits should be fully exploited and raised. Accordingly the fee was raised from Rs. 25 to Rs 200. Can it be said that this alteration was made reasonably? Taking it that the fee income must be more or less proportionate to the trouble and expense incurred by the Corporation in issuing licences and in controlling trades and other matters for which licences are issued, the reason at the bottom of the resolution of the Council is clearly not in accordance with the spirit of the Act. The fee was not raised because of the expense of collection or regulation but was merely a counter-demonstration to the order of Government refusing to allow the Corporation to take the Abkari revenue of the City. The result of this increase of fee has undoubtedly been to impose on the persons who store such liquor a very unfair burden as compared with other tax-payers in the City.

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From the evidence which has been adduced it would appear that the expenses of supervising the places where foreign liquor is stored are practically nil. The site is inspected when the licence is originally granted and, so far as the evidence goes, no further action appears to be taken. If we compare the fee for this licence with the fees for other matters which entail much greater expense and trouble on the Corporation, such as fees for stables, dairies and storing skins and explosives, we find that the fee for storing spirits is by far the highest although those other matters entail much greater trouble and are more dangerous and offensive to the general public. The fee for other licences was not raised at the same time and consequently it is impossible to hold that there was justification for raising the fee for a licence for storing spirits by 800 per cent. It was certainly not done with a view to pay for the expenses in connection with such licences but was obviously done to increase the revenue of the Corporation from liquor, thereby replacing the Abkari revenue taken by Government. This being so, I must find that Beasley, J., was amply justified in finding that the levy of the enhanced fee was unreasonable.

While holding that the enhanced licence fee is unreasonable, the learned Judge has in his decree ordered that the plaintiffs are therefore liable only to pay a licence fee of Rupees Twenty-five (Rs. 25) which sum is amply sufficient to cover all the duties performed and the expenses incurred by the defendant-Corporation with respect to those licensed premises and other premises in respect of which licences have been granted. While agreeing with him that the enhanced fee is excessive, I do not think that the Court is justified in taking upon itself the power conferred by the Act upon the Council, namely, the fixing of the amount of fees; in this case the omission to fix the fee for a licence will make no difference in the substance of the decree, for the fee which was formerly leviable was Rs. 25 and this figure must be restored, as the resolution for its enhancement is invalid and the plaintiffs are therefore entitled to the refund of the balance of Rs. 175. The words of the decree quoted above should therefore be removed, but the decree is in other respects confirmed.

A somewhat surprising argument has also been advanced on the question of costs. The learned Judge has passed the usual order that costs should follow the result, and the circumstances would have to be exceptional to justify our interference with the order. Not only must we be of opinion that there

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were circumstances which justified a departure from the usual order as to costs but we must be further satisfied that those circumstances were so exceptional that the learned Judge cannot have exercised his discretion judicially in ignoring them. That is far from being the case here and this ground of appeal must be rejected.

The appeal is accordingly dismissed with costs.

Reilly, J.

Reilly, J.—I agree with the finding of the learned Judge on the Original Side that the power given by the Madras City Municipal Act to the Council to levy licence-fees cannot be used as a power of taxation. The Act clearly provides in Part III for taxation and lays down what taxes the Corporation may levy. Then the Act goes on to an entirely different part, Part IV, which is headed "Public Health, Safety and Convenience'' In that part there are provisions to the effect that no person shall carry on certain trades or occupations or use any premises for certain purposes without getting a licence from the Commissioner. The section in that part with which we are particularly concerned is section 287, which provides that no person shall use any place for any of the specified purposes without getting the permission of the Commissioner in the form of a licence. A person who wishes to use his premises for such purposes has to apply for a licence. The Commissioner may grant, or refuse to grant, such a licence. If he grants it, he may fix any conditions or restrictions which he thinks necessary. There is nothing whatever in this section about a person who wishes to use his premises for such a purpose being taxed, or his occupation or his premises being taxed. He has under those provisions to get a licence When we come to the end of the Act, there is another part headed "Procedure and Miscellaneous." Section 365 at the beginning of that part sets out that every licence or permission must be signed by the Commissioner and must specify the restrictions, if any, which are imposed by the Commissioner Then sub-section (2) goes on to say "For every such licence or permission fees may be charged at such rate as may be sanctioned by the Council." It is suggested that the fixing of fees for these licences may be used by the Council as a method of taxation. Surely, if that was intended, that power would have been provided for in the part of the Act which deals with taxation. What could be the reason for bringing it in as a mere fact of procedure at the end of the Act? Mr. Rangaswami Aiyangar for the Corporation has suggested that, because in the sections which deal with taxa-

tion one or two of them refer to the method of collecting taxes as "by way of licence-fees" therefore we must hold that there is no distinction between licence-fees and taxes. I can see no sufficient reason in the rather loose language which is used in those sections about the means of collecting taxes to lead us to hold that under the Act it is intended that there should be no distinction between licence-fees and taxes. I do not think that the matter really admits of any doubt. But, if there were any doubt about the meaning of section 365 (2), if it were possible to read that sub-section in two ways—in one way as empowering the Council to impose taxes on persons who apply for licences and in another way as empowering them only to require those persons to pay fees—then under the ordinary principle of construction when we are dealing with a statute which imposes or which it is contended imposes any liability on a subject or citizen to taxation, it would be imperative upon us to adopt the construction most favourable to the subject or citizen. But I do not think it is necessary to call that principle of construction to our aid in this case. I cannot imagine that the Legislature, when providing for licence-fees under the heading "Procedure" and omitting them from the provisions regarding taxation, ever intended them to be treated in any way as taxes.

If the power to levy these fees cannot be used for taxation, it is admitted that the Council has not the power to fix any arbitrary fee which it chooses. Mr. Rangaswami Aiyangar has admitted that there must be some limit to its power and that the fees must be reasonable He has rightly contended that in interpreting the word "reasonable" in this connection we must give it a wide and liberal interpretation And I quite agree with his contention that, when such a question comes before a Court, it is not for the Judge to try minutely to assess what is the proper fee; nor is it for the Judge to substitute his judgment in the matter for that of the public body to which the legislature has entrusted it But I think there are two principles which we may use to determine whether the fees fixed by a Municipal Corporation with powers such as these can be held to be reasonable or not. If we accept the proposition that the power of charging licence-fees cannot be used for taxation, then we must say that as a whole the fees charged by the Corporation must not be very much in excess of what the duties cast upon them and their staff in connection with the licences cost them. There is the cost of issuing the licences; there is the cost of inspecting the premises to see whether they are suitable for the purpose proposed; and

there is the subsequent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are observed. But roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the Corporation then I think we can rightly say that they are unreasonable There is another principle. Although it is almost impossible for the Corporation itself to ascertain, when they issue a number of licences to persons engaged in different trades and occupations, exactly, what is the cost of any particular licence or licenses for persons engaged in particular trades or occupations—and certainly we could not attempt anything of that sort—yet surely it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it, was imposed on one particular trade or a few particular trades. These principles, I think, may be of help in ascertaining whether a particular fee is reasonable or not. Mr. Rangaswami Aiyangar referred us to the case of *Kruse* v. *Johnson*[1] and asked us to accept the view of what is reasonable and unreasonable taken by Lord Russell, C.J , in that case. That I am very willing to do. But we must remember that Lord Russell in that case said that a bye-law which was partial or unequal in its operation would be unreasonable; and in the same way I think we can properly say that a licence fee, if it was imposed partially or in a way which would make it unequal in operation, would also be unreasonable.

Mr. Rangaswami Aiyangar has tried to tell us how much the issue of these licences is costing the Corporation a year, and he has put before us some calculations which show that the total cost of the licensing operations is about Rs. 95,000 a year I cannot say that I am entirely satisfied with the way in which he has arrived at that result. It appears to me that some parts of his calculations required a good deal of clearing up. But let us assume that his figures are correct. He has also told us that the total amount collected for these licences is about Rs 90,000 a year If these figures are correct, the Corporation is collecting about Rs. 5,000 less than what the licensing operations cost them If that is so, it would be very reasonable for them to increase their licence-fees so as to cover the deficit. How they should increase them is not for us to determine. One obvious method would be an all-

1. (1898) 2 Q.B. 91.

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round increase of licence-fees so as to cover the deficit. Another method would be to find out whether some licence-fees are clearly too low and to raise them. But what has the Corporation done in this case? From the schedule with which Mr. Rangaswami Aiyangar has provided us it appears that there are over a hundred different classes of occupations and trades for which people have to apply for licences. They have selected the one with which we are concerned—the storing of spirits. The fee for storing spirits before the change with which we are concerned was made was Rs. 25 a year. The storing of spirits is obviously not a very dangerous thing. It is not a thing which is offensive to the physical senses of persons in the neighbourhood. And the evidence shows that the Corporation and its staff spend practically no time or effort on inspecting places where spirits are stored. For that kind of licence one would expect to find a very moderate fee charged Perhaps it may be said that Rs. 25 was a moderate fee. But they determined to raise it; and they proceeded to raise it eight times, to Rs 200. That I find is double the amount charged for storing any other thing, however dangerous or offensive, in this town. It is four times what is charged for licensing places for storing such dangerous things as nitro-glycerine, fulminate of mercury and other explosives It is many times the fee charged for storing fire-works. On the calculations which Mr. Rangaswami Aiyangar has made it appears that, before this change in the rate of fee, about 1|48 of the whole cost of the licensing operations was collected from the persons who had to obtain licences for storing spirits: after the change, about one-sixth of the whole cost of the licensing operations is collected from them. We are informed that there are only 72 of these particular licences. I find from the schedule with which we have been provided that more than 6,700 licenses are issued for trades, businesses and occupations. But 72 of them are made to pay about one-sixth of the cost of the whole licensing operations. I think that, when these facts are stated, no one could really contend that the fee fixed Rs. 200 is in any sense of the word a reasonable one. That being so, the Council had no power to fix the fee at so high a figure. They appear to have done it with the intention of using their power as a power of taxation; and I may add that they appear to have used their power for improper discrimination.

I therefore agree that there is no sufficient reason for us to interfere with the decree of the learned Judge that the excess over Rs. 25 for each of these licenses must be refunded to the

plaintiffs. I agree also that the learned Judge went too far when he attempted to decide for the present or for the future what is the reasonable fee which the Council should fix. That I think is a matter for them; and therefore I agree that the words quoted from the decree by my learned brother should be struck out. With that modification I agree that this appeal must be dismissed with costs.

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N.S. *Appeal dismissed with slight modification of the decree.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH AND SIR JOHN WALLIS.

Atmaram Bhagwant Ghadgay .. *Appellant**

v.

The Collector of Nagpur .. *Respondent.*

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Atmaram Bhagwant Ghadgay v. Collector of Nagpur.

Land Acquisition Act (I of 1894), S. 23—Compensation—Assessment of—Basis of—Compensation awarded to other owners and not objected to by them—Consideration of—Propriety of—Limit to—S 21 of Act—Effect—Assessment of compensation by Court below—Privy Council's interference with—Conditions.

An owner of lands acquired under the Land Acquisition Act is entitled to the value to himself of the property in its actual condition at the time of expropriation with all its then existing advantages and with all its future possibilities, excluding only any advantage due to the carrying out of the scheme for the purposes for which the property was being acquired.

In appeals involving questions of valuation, the decree complained of will not be interfered with by their Lordships unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied.

In a case in which the lands of several different owners were acquired under the Land Acquisition Act, all of them, except the appellant, accepted the Collector's award. The appellant did not do so and had the valuation of his land referred to the Court under S. 18 of the Act. The District Judge carefully addressed himself to all the considerations pertinent to the appellant's own lands, had due regard to the attitude of the other owners in not objecting to the Collector's award, and awarded to the appellant compensation on a certain basis The Appellate Court reversed his judgment, ignoring all the considerations pertinent to the appellant's own lands and founding itself exclusively on the evidence as to the price accepted for the other plots. That evidence, when analysed, however showed, that the lands of the different owners were not of a uniform value for any purpose and that the fact that the other owners had accepted the Collector's

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*P C Appeal No. 47 of 1927. 22nd January, 1929.

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award was very unreliable as a basis of the true value even of their own land

Held, that the Appellate Court had, in reversing the District Judge, acted on a wrong principle, and that its judgment must be set aside and that of the District Judge restored.

It is hardly too much to say that the Appellate Court, in its exclusive reliance upon the attitude of the owners other than the appellant, were within an ace of ignoring the prohibition imposed upon them by S 21 of the Land Acquisition Act and of extending the range of the inquiry beyond the statutory limit thereby set

Appeal No. 47 of 1927 against a decree made on the 13th October, 1923 under the Land Acquisition Act (I of 1894) by the Court of the Judicial Commissioner, Central Provinces (Messrs. Hallifax and Baker) varying an award made on the 29th August, 1921 by the District Judge of Nagpur on a reference made under section 18 of the said Act.

The material facts of the case appear sufficiently from their Lordships' judgment.

Lowndes, K C. and *Wallach* for appellant.

Dunne, K.C. and *K. Brown* for respondent.

Lowndes, K.C.—The scheme of the Land Acquisition Act is that the Collector makes the award, and if the parties do not accept it, reference is made to the Court. The Board have, no doubt, ruled that when appeals are brought here, they will not go into questions of mere valuation, but those decisions are distinguishable. The Appellate Court acted illegally in admitting additional evidence. They could do so only on certain conditions; *see* the Civil Procedure Code, 1908, O. 41, R. 27 and Lord Robertson's judgment in *Kessowji Issur* v. *Great Indian Peninsula Railway Company.*[1]

As regards the Collector's functions in land acquisition cases, see *Esra* v. *Secretary of State for India.*[2]

Dunne, K.C.—The Judicial Committee will not review the decree of an Indian Appellate Court merely upon questions of value; see *Nowroji Rustomji Wadia* v. *The Government of Bombay*[3] and *Narsingh Das* v. *Secretary of State for India.*[4]

[*Lord Blanesburgh.*—Lord Buckmaster in *Narsingh Das* v. *Secretary of State for India*[4] is not obviously referring to cases where there has been a difference of opinion in India, the Trial

1. (1907) L.R. 34 I.A. 115: I.L.R. 31 B. 381. 17 M.L.J 347 (P C).
2. (1905) L.R 32 I.A. 93: I L.R. 32 C. 605 (P C)
3. (1925) L.R. 52 I.A. 367: I.L.R. 49 B 700: 49 M.L.J. 233 (P.C.).
4. (1924) L.R. 52 I.A. 133: I.L.R. 6 Lah. 69: 48 M.L.J. 386 (P.C.).

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Court taking one view and the High Court taking another. I don't think that the judgment in *Narsingh Das* v. *Secretary of State for India*[4] covers a case where you have diametrically opposite views taken by the Courts in India.]

The Board have said that they will not go into questions of valuation.

[*Lord Dunedin.*—But the judgment now under appeal seems on the face of it to be palpably wrong.]

The Privy Council have laid down as a working rule of practice that appeals in valuation cases will only be entertained on questions of principle.

I submit that the fact that the other proprietors accepted the award is some evidence of value. If the learned Judicial Commissioners had present to their minds the principles laid down by this Board, your Lordships will not interfere. I submit that they did bear those principles in mind in deciding the case.

Section 24 of the Act expressly enacts that the Court shall not take into consideration any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired.

The Judicial Commissioners had before them the question, whether the land should be valued as agricultural land or as potential building site, and they rightly took into consideration the fact that the other proprietors treated it as agricultural land and not potential building site.

The additional evidence was rightly admitted in appeal The rule laid down by Lord Robertson in *Kessowji's case*[1] has since been qualified by the pronouncement of the Board in *Indrajit Pratap Sahi* v. *Amar Singh.*[5]

Lowndes, K.C., was not called upon to reply.

22nd Jan. 1929. Their Lordships' judgment was delivered by

Lord Blanesburgh.

Lord Blanesburgh.—In 1919 the Government of India acquired, under the provisions of the Land Acquisition Act (I of 1894) for the purposes of the extension of the Hump Yard

1 (1907) L.R. 34 I.A. 115· I.L.R. 31 B. 381: 17 M L J 347·(P C).

4. (1924) L R. 52 I A. 133: I.L R. 6 Lah. 69. 48 M.L J 386 (P.C).

5. (1923) L.R. 50 I.A. 183· I.L.R. 2 Pat 676: 45 M.L.J. 578 (P.C.).

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of the Great Indian Peninsular Railway at Nagpur, an area of 258 acres, then under cultivation and within the holdings of 25 different owners. The appellant was one of these owners, claiming in respect of 34 acres of the land so acquired. His holding consisted of a main plot, with two separate patches adjacent thereto, so small, however, that, as has throughout been agreed, these patches can have no effect upon the considerations in accordance with which the value of the appellant's whole area must be determined. The Collector acting under section 11 of the Act, and treating the land as agricultural land only, awarded compensation to the appellant at a flat rate of Rs. 60 per acre. Indeed, he awarded the same flat rate, in respect of their holdings, to all the 25 owners of the 258 acres. And, although no serious case has been made against it if properly based upon agricultural value, the award of the Collector must have been in the nature of an agreeable surprise to the undertakers. The estimated cost of acquisition had been, as appears from the Land Acquisition Officer's Report, Rs. 62,000. The aggregate sum actually awarded amounted to Rs 35,470 only.

The appellant did not accept the award, and he duly required the valuation of his land to be referred for the determination of the Court under section 18 of the Act. He claimed compensation at the rate of Rs. 2,000 an acre—a valuation based upon his assertion, not in the event established, that his land was an actual building site, and that it should be valued accordingly.

The case was in due course referred by the Land Acquisition Officer to the Additional District Judge of Nagpur, and before him voluminous evidence, both documentary and oral, was produced from both sides.

The Collector, in his reply to the appellant's written statement, referred to a fact, since more definitely ascertained, that the owners of the 258 acres, other than the appellant, had accepted the Collector's award so far as they individually were concerned. It does not, however, appear that before the learned District Judge there was attached to this circumstance, by either side, the decisive significance which by the Court of the Judicial Commissioner was ultimately attributed to it. Before the learned District Judge the evidence was directed rather to the question whether the appellant's land, although hitherto used only for agricultural purposes, was or was not adopted for building. The value of building land in its neighbourhood, and the probable direction of the prospective development of Nagpur,

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with the remoteness or otherwise of that event, were canvassed, with much elaboration, by witnesses on each side. In the result, the learned District Judge, greatly impressed by one of the appellant's witnesses, Mr. Kashinath Bhide, a municipal engineer, came to the conclusion that the appellant's lands should be valued on the basis of their being "problematical building sites in an undeveloped form." On the same basis, Mr. Kashinath Bhide had valued the lands at Rs. 500 an acre: but the learned Judge, being of opinion that the engineer had attached undue importance to some of the favourable features in the situation of the appellant's lands, and that the period of development might be more distant, and would be more prolonged than the engineer had anticipated, reached the conclusion that upon that basis the proper compensation to be allowed to the appellant was Rs. 300 an acre. By his award of the 29th August, 1921, whereby he declared that the appellant was entitled to Rs. 10,137 compensation, with Rs 1,520-8 in respect of compulsory acquisition, he gave effect to that conclusion. The learned Judge's decision was that the appellant should receive Rs. 11,657, with interest thereon at 6 per cent per annum from the 5th November, 1921, till payment. Each party was directed to pay his own costs, each having partially failed.

Now, the proper principles applicable to the case were not in controversy before the Board. An owner of lands in the position of the appellant is entitled, it was agreed, to the value to himself of the property in its actual condition at the time of expropriation with all its then existing advantages and with all its future possibilities, excluding only any advantage due to the carrying out of the scheme for the purposes for which the property was being acquired.

And the position of the Board in such matters is equally clearly settled. In appeals involving questions of valuation, the decree complained of will not be interfered with by their Lordships unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied.

And, so far as the order of the District Judge is concerned, it appears to their Lordships, and it is convenient at once to say so, that in reaching his conclusion the learned Judge upon the materials before him governed himself by sound principle. Nor has anything been shown to their Lordships which would lead them to the conclusion that he had not before him evidence on which he might fairly reach the conclusion at which he arrived.

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From his decision, however, the Collector appealed to the Judicial Commissioner for the Central Provinces, asking that the award of the District Judge might be reversed and that of the Land Acquisition Officer restored. On that appeal the Collector sought to emphasise as his main contention the inference to be deduced from the action of the other owners already alluded to, and before the case was opened his Counsel asked that the records of the Land Acquisition Officer's proceedings in relation to the acquisition of the whole 258 acres might be received in evidence so as to show the circumstances of the owners who, other than the appellant, had accepted the rate offered without claiming any reference to the Civil Court. The appellant's Counsel objected and claimed the right to cross-examine these owners; he also asked for leave himself to tender evidence of recent sales of land in the immediate vicinity. In the result the Court, admitting all the evidence, directed it to be taken in the Lower Court, and to be returned for consideration at the adjourned hearing of the appeal.

The evidence was accordingly so taken, although, strangely enough, the owners, vouched by the Collector, were left to be called by the appellant and were cross-examined not on his behalf but by Counsel for the Collector. Even so, however, the general result of their evidence was, as their Lordships think, to show how unreliable as a basis of the true value, even of their own land, was the fact that they had each accepted the officer's award. It was with the utmost reluctance that most of them had done so: some were fearful of fighting the Government: others were without funds for such a contest. To their Lordships it seems that if their evidence as a whole pointed to any conclusion at all, it was that the lands of the different owners were not of a uniform value, possibly not even for agricultural purposes, certainly for no other, while in few of the cases could the acceptance of the Collector's award be of itself regarded as a true indication even of the value as between a willing seller and a willing buyer of the land actually in question.

Yet this was the only evidence to which the learned Judges of the Court of the Judicial Commissioner finally had regard in fixing the value of the appellant's land.

The gist of their decision is to be found in the following three paras. of their judgment:—

"4 Many rulings have been cited in this Court in regard to the principles on which the compensation in such cases as this ought to be fixed,

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and long arguments have been addressed to us to show that the land ought to be regarded as building sites and not as agricultural land and that the town of Nagpur is spreading in that direction. But there is in practice one way only of applying those principles and of ascertaining the facts on which their application depends, and that is by taking evidence of the prices paid for similar land in similar circumstances This evidence is often difficult to get, but it happens that we have in this case the most satisfactory possible evidence, at which nobody in the Civil Court took the trouble to look.

"5. The area of 223.97 surrounding what is practically the whole of the plot under consideration was acquired from twenty-four different owners. Every one of them has accepted the award of the Collector, in which the rates were exactly the same as those given by him to the claimant, roughly Rs. 30 an acre, and not one of them even demanded a reference to the Civil Court Ten of them accepted the Collector's rates without any demur at all. One asked for Rs 60 an acre, one for Rs. 100, five for Rs. 200, two for Rs. 250, one each for Rs. 300, Rs 400, Rs 500 and Rs. 1,000, and one, like the present claimant, for Rs 2,000, but not one of them went beyond making a formal sort of demand. It is hard to imagine better evidence of the sufficiency of the rates on which the Collector's calculation of the compensation is based.

"6 A good deal of evidence has been given of the high prices paid for land close to that in question though a little nearer the town That the land in question is outside the area for which these high prices can be obtained is proved by the fact that a portion of the land for which the lower price has been accepted without demur lies between it and that area. An attempt has also been made to show by cross-examination of a few of the twenty-four owners who accepted the award of the Collector, that they refrained from contesting it for reasons other than that they were of opinion that they would not get any more by doing so. This has naturally failed entirely."

It will be noted that the learned Judicial Commissioners were apparently of opinion that the cross-examination of the owners had been conducted by the appellant, and not, as it was, by the Collector. But, apart from that consideration, their Lordships cannot, as they have already indicated, agree with the learned Judicial Commissioners' view of the evidence. Its true result, as they have already stated, only serves, as they think, to emphasise the error of principle into which the learned Judicial Commissioners fell, when they ignored all the considerations pertinent to the appellant's own lands to which the learned District Judge addressed himself so carefully, and founded themselves exclusively on the evidence as to the price accepted for other plots, the conditions of which were certainly not fully before them. Indeed, a mere inspection of the plan of all the plots put in and agreed shows even to casual observation that the situation of the appellant's land with regard to such matters as access and building convenience, may well be superior to those of nearly all, if not indeed to all, the other plots acquired. It is in short hardly too much to say that the Appellate Court, in its exclus-

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ive reliance upon the attitude of the owners other than the appellant, were within an ace of ignoring the prohibition imposed upon them by section 21 of the Act and of extending the range of the inquiry beyond the statutory limit thereby set.

In these circumstances their Lordships cannot doubt that the Court of the Judicial Commissioner, which, by its judgment of the 13th October, 1923, set aside for the reasons just set forth the award of the learned District Judge, and restored that of the Collector, acted on a wrong principle, which the appellant is entitled to ask the Board to correct.

In their Lordships' judgment the order of the Court of the Judicial Commissioner, based upon that mistaken principle, should be set aside, and, as it has not been shown that the attitude of the other owners did not receive at his hand all the consideration it deserved, and as no other objection to which their Lordships can have regard has been taken to it, they think that the order of the learned District Judge must be restored. And their Lordships will humbly advise His Majesty accordingly. The respondent will pay the appellant's costs in the Judicial Commissioner's Court and of this appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE WALLER.

Messrs. Ralli Brothers, Madras .. *Appellants**
(Opposite Party)

v.

Perumal .. *Respondent*
(Applicant).

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Messrs. Ralli Brothers, Madras v. Perumal.

Workmen's Compensation Act (VIII of 1923), S 2 (1) (n) and Sch II (5)—Workman within the meaning of the Act—Test—"Employed for the purpose of loading" in Sch II (5)—Meaning of

The respondent, who was in the employment of the appellants, was employed in a warehouse which was within the premises of the Port Trust and leased by that body to the appellants The godown was about a quarter of a mile away from the wharf alongside which steamers were moored Into that godown were stored various goods, the property of the appellants, some awaiting shipment to Europe and some ready to be entrained at the

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*C.M.A. No 369 of 1928. 25th March, 1929.

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neighbouring railway station to be conveyed to various destinations in British India The injuries to the respondent were caused by a bale of cotton being lowered from the upper floor of the godown by a crane to the lower floor in which he was waiting to receive it Owing to negligent handling of the crane the bale was lowered on to his leg and caused the injury for which he sought compensation That bale was in fact destined to be put on board a ship lying alongside the quay in the harbour to be conveyed by that ship to Europe In the ordinary course the respondent on receiving that bale would have taken it out of the slings of the crane, handed it over to cartmen who would have put it on their hand cart, taken it to the quay side, a quarter of a mile away, and then have handed it over to a gang of stevedores on the quay whose duty it was to put it into the slings of the ship's crane or the Port Trust crane to be slung aboard the ship and stowed in the hold.

Held, that the respondent was not a workman within the meaning of section 2 (1) (*n*) of Act VIII of 1923 read with its second schedule.

Per The Chief Justice—The respondent was not "employed for the purpose of loading a ship" within the meaning of Schedule II (5) of the Act The words "for the purpose of" really do not amount to more than if the section had said "in loading" The work of loading does not begin until there is a contact and collaboration between the cargo-owner's servants in charge of the cargo on shore and the ship's crew or stevedores employed in their place are ready on board the ship to receive the goods as they come over the ship's rail and stow them in the hold.

Per Waller, J—The Act means that loading begins where unloading ends, by the side of the ship.

Appeal against the order, dated 11th September, 1928 of the Court of the Commissioner for Workmen's Compensation, Madras, made in Application No. 151 of 1928.

Nugent Grant instructed by *Messrs. King and Partridge* for appellants.

K. V. Krishnaswami Aiyar for *K. V. Sesha Aiyangar* for respondent.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The facts in this case are fortunately not in dispute and are stated in the order of the Commissioner. I can shortly summarise them as follows:—The applicant, the injured workman, who, it is agreed for the purposes of this case, is to be treated as being in the employment of Messrs. Ralli Brothers, the appellants before us, was employed in a warehouse which was within the premises of the Port Trust and leased by that body to Messrs. Ralli Brothers. The godown was about a quarter of a mile away from the wharf alongside which steamers are moored. Into that godown were stored various goods, the property of Messrs. Ralli Brothers, some awaiting shipment to Europe and some ready to be entrained at the neighbouring railway station to be conveyed to various destinations in British India. The injuries to the work-

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man were caused by a bale of cotton being lowered from the upper floor of the godown by a crane to the lower floor in which he was waiting to receive it. Owing to negligent handling of the crane the bale was lowered on to his leg and caused the injury, for which he now seeks compensation. That bale was in fact destined to be put on board a ship lying alongside the quay in the harbour to be conveyed by that ship to Europe. In the ordinary course the applicant on receiving that bale would have taken it out of the slings of the crane, handed it over to cart-men who would have put it on their hand cart, taken it to the quayside, a quarter of a mile away and then have handed it over to a gang of stevedores on the quay whose duty it was to put it into the slings of the ship's crane or the Port Trust crane to be slung aboard the ship and stowed in the hold.

The question that arises under the Indian Act (VIII of 1923) is whether this applicant is a workman within the meaning of section 2 (1) (*n*) of the Act read with its second schedule. It is not questioned that, if he was a workman within the meaning of the Act, the acts which caused him injury arose out of and in the course of his employment. The material words are to be found in Schedule II (5):

"Employed for the purpose of loading, unloading or coaling any ship at any pier, jetty, landing place, wharf, quay, dock, warehouse or shed, on, in or at which mechanical power is used"

Mechanical power was clearly used in lowering this bale from the upper to the lower floor of the warehouse and therefore the only question we have to consider is whether this man was employed for the purpose of loading a ship. If the words in Schedule II "at any pier, jetty" and so forth refer only to "ship" and do not relate back to the word "employed," the decision must clearly be against the workman, because the ship was not "at" the warehouse in which he worked which was a quarter of a mile away from the ship; and if that be the true construction of this not very clearly drafted section, there is no more to be said and his case must fail because the schedule in that event would relate only to warehouses which are in such a position that goods could be directly slung from them straight on board the ship waiting at the quayside. The Commissioner has adopted another construction of the section of the schedule and has related the words "at any pier," "jetty" and so forth back to the word "employed." I would only say in passing that it seems to be inapt language to describe a man as being employed "at" and not "in" a warehouse or shed. But I think it is advisable that we should deal with the matter on broader

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lines and consider whether this man can be said within the meaning of the Act to have been employed "for the purpose" of loading a ship. It is obvious that on any view of this case a line must be drawn somewhere. This particular bale of cotton came from Tinnevelly whence it was consigned by rail to Messrs Ralli Brothers in Madras to be stored in a godown and ultimately to be put on board a steamer bound for Europe. No one, I think, would contend that a workman who handled the goods in a warehouse in Tinnevelly could reasonably be said to be employed for the purpose of loading a steamer in Madras. The line must be drawn somewhere and I think that in English cases the principle can be found as to where it is to be drawn. It may be true, as was said by the learned counsel who appeared for the workman, that the trend of the highest authorities in England in interpreting the Workmen's Compensation Act of 1906 is to give a broad interpretation to the statute in the direction of favour to the workman. But there is this difference between the English and the Indian Statute that, whereas the former applies to all workmen, the latter only applies to certain defined classes of workmen and casts upon us, in my opinion, the duty of defining those classes with such precision as is possible. We are not without guidance in English cases of high authority as to what point is to be taken as that at which the process of loading begins. It has been said by both sides in turn that those cases are not direct authorities because they are cases relating not to any question of workmen's compensation but to the respective liability of shipper and charterer. I do not see any reason on that account to deprive myself of their guidance in determining the question when it is to be said that the process of loading begins.

The earliest case cited to us was *Hudson* v. *Ede*.[1] That arose out of a charterparty which contained an exception for the running of lay days against the charterer in the event of frost preventing shipment. It was known to everybody concerned that the only possible method of shipment was to bring the goods by river for a hundred miles down the Danube to the place where the ship was then lying It was held that the frost on the Danube which prevented this transport prevented loading within the exceptions of the charterparty. That aspect of the case was emphasized by the decision of the House of Lords in *Grant & Co.* v. *Coverdale, Todd & Co.*[2]

1. (1868) L R. 3 Q B. 412.
2 (1884) 9 App. Cases 470

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To that case I now turn as it appears to me to be decisive of the case before us. The case there was that a canal which communicated with the dock where the steamer was lying was frozen over, so that until the frost broke it was impossible to bring the goods to be loaded on the ship by lighters to the ship's side by water. The expense of transporting the goods to the dock by land would have been commercially prohibitive. Nevertheless the House of Lords held that, as the dock was not frozen over, the clause did not exempt the charterers from payment of demurrage in respect of the extra lay days during which the ship was detained waiting for the cargo. The case is of cardinal importance on the present question and I propose to quote a few words from the judgments of the learned Lords who took part in the decision. The words of exception there were "strikes, frosts, floods, and all other unavoidable accidents preventing the loading." Lord Selborne there said "If therefore you are to carry back the loading to anything" (which in the context clearly means 'everything') "necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop." His Lordship goes on to enumerate remote causes preventing the loading, such as the bankruptcy of the person who is to supply the cargo, to take the most extreme instance, and sums it up thus:

> "All those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time; but is it reasonable that the shipper should be held to be answerable for all those things, and is that within the natural meaning of the word 'loading'? Are those things any part of the operation of loading?"

And applying the maxim *Causa proxima non remota spectatur* His Lordship answers his own question in the negative. He then proceeds to comment on the case of *Hudson* v. *Ede*[1] and he says this about it:

> "Where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as, for instance, that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place from which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And if the facts had been so about this particular wharf on the Glamorganshire Canal, if that had been the only possible place from which goods could be brought to be loaded at the East Bute Dock, that authority might have applied But not only was that not the case, but in point of fact cargo not only could be, but actually had been brought up by carts to the East Bute Dock and put on board ship; and I infer from the finding of the referee

1 (1868) L.R. 3 Q.B. 412.

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that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you were to look at the interest of the charterer; but if the charterer has engaged that he will do a certain thing, he must of course pay the damage which arises from his not doing it.''

I quote also a sentence from Lord Bramwell at p. 478:

''In the present case frost did not prevent the loading, what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented.''

A suggested conflict between these cases was considered by the Court of Appeal in *Stephens* v. *Harris & Co.*[3] and it was held that they were consistent and that *Hudson* v. *Ede*[1] might still stand as good law on the footing that it was there proved by evidence that the only possible means of access to the ship was by lighters covering a river journey over a hundred miles and that that mode of access was in fact blocked by frost.

Applying this reasoning to the case before us, as I respectfully do, it seems to be impossible to say that the only practicable mode of loading this ship was the one actually adopted in this case. If you exclude that, this man was clearly not employed in loading the ship. Lord Selborne clearly defines what is to be understood as ordinarily comprising the operation of loading, *viz.*, as commencing when the ship, that is to say, its crew begins to take part in the operation. The goods to be shipped are alongside the quay, the ship's crew or stevedores employed by the ship for the purpose are working the ship's derricks ready to receive the cargo as it is slung over the rail. In other words, the work of loading does not begin until there is a contact and collaboration between the cargo owner's servants in charge of the cargo on shore and the ship's crew or stevedores employed in their place are ready on board ship to receive the goods as they come over the ship's rail and stow them in the hold.

I feel myself constrained to follow that high authority and decide that this man was not "employed for the purpose of loading a ship." It seems to me that the words "for the purpose of" really do not amount to more than if the section had said "in loading." If they are held to mean more, we are driven to fixing a line somewhere between the workman who handles the goods at Tinnevelly and the workman who handles them on the quayside in the Madras harbour and is brought into

1 (1868) L.R. 3 Q.B. 412

3 (1887) 57 L.J. (Q.B.) 203

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direct contact and co-operation with those receiving the cargo on board; and where to fix that line I know not. The intervention of the carting coolies between the task of this workman and the coolies ready to handle the bales on the quayside seems to me to be a break in the chain which is fatal to this workman. Moreover, I find it difficult to believe that it could be reasonable to conclude that a man engaged in "loading" should be in a better position than one engaged in the same place and on the same work in handling cargo "unloaded" from a ship. No one, I think, could maintain that if the same processes proved in this case were reversed, as in the case of discharging a ship's cargo, this man could possibly bring himself within the Act. The ship discharges her cargo on to the quay; when that is done she is unloaded, and so far as I can see can have no further concern in the subsequent handling of the cargo. Having discharged her cargo, she is free to sail. This man might have been injured exactly in the same way in handling her cargo on its way into the godown as he was in handling it on its way out. But I do not think it could be said that a man who was injured thus when the ship had sailed and was truck down on the horizon was engaged in unloading her.

We had also cited to us the case of *Stuart* v. *Nixon & Bruce*.[4] In that case a stevedore who was employed in stowing goods into the hold of a ship was held to be continued to be employed for that purpose when the cargo was all in the hold and he was only occupied in the operation necessary to put on the hatchway cover; and in the course of doing that he was injured. That seems to me to amount to this: that, if a man is employed to pack things in a box, as part of his business he has to put the lid on the box; for, after all, a hold in a ship is nothing more than a big box. I do not think that that decision gives any real assistance in this case. It was apparently cited merely for the purpose of supporting the argument that loading is not to be limited to the mere operation of putting the cargo from the wharf into the hold and with that proposition no one desires to quarrel; but it seems to me to have no application to the present case.

I regret the result, for the reason that it presumably precludes an appeal to the Privy Council, from whom we should have welcomed further guidance if only because we are told that our decision affects over a million labourers in this country. The employers could and would appeal, had our decision been against

4. (1901) App. Cases 79.

them; but labour is as yet so little organised in this country, that there are no funds available, so far as I know, to take up a test case. I am glad to be told that the employers are fighting this case on principle only, and that this individual workman will be given a generous *ex gratia* payment in any event.

Waller, J.—The respondent, at the time of the accident, was employed by the appellants at a godown rented by them from the Port Trust. He was engaged in hoisting and lowering by means of a hydraulic crane certain goods, some of which —casks of ghee—had been unloaded from a ship, others of which—bales of cotton—were about to be loaded on to another. Some bales of cotton, which were being lowered, fell on him and injured his right leg. The Commissioner found that he was a "workman" within the meaning of the Act, conceding at the same time that, if he had been injured by a cask of ghee, in respect of which the process of unloading was already complete, he would not have been entitled to the benefit of the Act. It is a curious anomaly that a man employed in handling goods for shipment by sea should be within the Act, while another employed in the same warehouse in handling goods for shipment by rail should be outside it.

The process of removing cotton from the godown to the ship is described by Mr. Wright, the appellants' godown and shipping manager, as follows:—One set of workmen—in this case the applicant was one of them—lower the bales, release them from the slings and put them aside ready for the carts. They work under Maistries employed by the appellants. The bales are then placed on carts, taken to the quay and tipped on to it. They are finally loaded on to the ship by another set of workmen. These workmen as well as the cartmen are employed by the appellants' shipping contractor.

The relevant part of the Act is Schedule II (5), which defines a workman—for our present purpose—as a person

"employed for the purpose of loading, unloading or coaling any ship at any pier, jetty, landing place, wharf, quay, dock, warehouse or shed, on, in or at which steam, water or other mechanical or electrical power is used."

The clause is obviously susceptible of two meanings. It may mean either that the person is to be employed at the pier, jetty or other loading place or that the ship must be lying beside it. If the latter is the correct construction the respondent is out of court, for the godown in question is quarter of a mile away from the quay. The Commissioner preferred the former, which he thought to be the more logical of the two.

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I should myself have thought that the more logical construction is that which avoids the anomaly above referred to and to say that the Act means that loading begins where unloading ends, by the side of the ship. That is, I think, the intention of the clause. It enumerates a number of loading and unloading places. All eight of them are places where the operation of unloading is carried out directly from the ship. The first six of them are places from which the operation of loading is carried out directly on to the ship. The most natural construction, in my judgment, is to hold that the last two—warehouses and sheds—are intended to be similarly situated, in juxtaposition to the ship. If it is to be held that the process of loading can begin at a warehouse at a distance from the ship, I can see no limit to the distance. In this instance, it is quarter of a mile, but the respondent might have been handling these bales in a godown at Chingleput—36 miles away—preparatory to their being put on to carts to be driven to the quay side and I do not see how, on the construction adopted by the Commissioner, he could have been denied the benefit of the Act. In *Grant & Co.* v. *Coverdale, Todd & Co.*[2] Lord Watson said that he was not prepared to assent to a construction "which would imply that the word 'loading' had as many different meanings as there were merchants or manufacturers of iron in Cardiff who happened to select different localities in order to store their iron for the purpose of shipment." He was, no doubt, considering the meaning of the word in relation to a charterparty, but I quote his observations in order to show the difficulties we shall be involved in, if we decide that a "warehouse," within the intention of clause (5), can be a place, situated at a distance from a ship, where goods are stored for the purpose of shipment. If the Legislature desires to protect all workmen employed in such places—and it is conceded that, even on the Commissioner's construction, only some of them, those employed for the purpose of handling goods for shipment by sea, are at present protected—that can easily be done by notifying under sub-section (3) of section 2 of the Act that their occupation is hazardous.

Beasley, J.—I agree.

A.S.V. *Appeal allowed.*

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2. (1884) 9 App. Cases 470.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

K. Abdul Salam Sahib trading under the name and style of K. Sheikh Meera Saheb & Co. .. *Appellant* (Applt. in S.A. No. 1328 of 1924 on the file of the High Court—Plff.)*

v.

Batchu Veerabhadra Raju .. *Respondent (Respdt. in do.—Defdt.).*

F. B.

Abdul Salam Sahib *v.* Veerabhadra Raju.

Civil Procedure Code (V of 1908), S. 73 and Order 21, Rule 11—Application for attachment of fund in Court—Application defective in form as an execution application—Right to rateable distribution.

An application for attachment of an amount in Court is a sufficient application to that Court for the execution of the decree within the meaning of S. 73 of the Civil Procedure Code, although it is defective in form by reason of its not strictly conforming to the provisions of Order 21, Rule 11 of the same Code

Appeal under clause (15) of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss and the Hon'ble Mr. Justice Jackson in S. A. No. 1328 of 1924 preferred against the decree of the Court of the Subordinate Judge of Cocanada in A.S. No. 50 of 1924 (O.S. No. 204 of 1923, Court of the Principal District Munsif, Cocanada).

T. Krishnaswami Aiyangar and *S. K. Narasimhachariar* for appellant.

The judgment of the Court was delivered by

Wallace, J.

Wallace, J.—This case comes before this Bench in the matter of the judgment of this Court in a second appeal. There was a disagreement in the judgment of this Court in S.A. No. 1328 of 1924 between two learned Judges of this Court, Mr. Justice Devadoss and Mr. Justice Jackson. The appellant's appeal stood dismissed on this difference of opinion and he has put in this Letters Patent Appeal.

The sole question for decision is whether Ex. C, which was an application for attachment of an amount in the trial Court put in by the plaintiff, the appellant here, is a sufficient application to that Court for the execution of a decree within the meaning of section 73 of the Code of Civil Procedure. The sum which he attached was the proceeds of a sale under an

*L.P.A. No 312 of 1927. 25th February, 1929.

F. B.

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Wallace, J.

attachment before judgment by the defendant to his suit. The plaintiff himself obtained his decree on 16th June, 1922, and on the 30th June following he put in the application, Ex. C, asking for an order of attachment and an order was passed attaching the fund which had been paid into Court to the credit of the defendant's suit. There were admittedly certain defects in the application, Ex. C, a lack of certain particulars which are required under O. 21, R. 11 for a proper formal execution application under that rule. But what we are concerned with is not so much whether that application conforms to the provisions of O. 21, R. 11 but whether it is for practical purposes and for the purpose of S. 73 a sufficient application for the execution of a decree. Mr. Justice Devadoss held in favour of the appellant that the application was sufficient for that purpose. Mr. Justice Jackson, impressed by the want of particulars required by O. 21, R. 11, has held that the application could not be treated as a proper application for the execution of a decree for the purpose even of S. 73. Now the executing Court itself, although it treated Ex. C as an interlocutory application in the suit, did as a matter of fact issue an attachment by its order upon the petition. That is, it did in fact treat it as an effective execution application for the execution of the plaintiff's decree. It did not consider the lack of particulars as calling for any amendment, alteration or correction, and did not return the petition for supply of those particulars; it admitted the petition, accepted it and issued attachment. On these facts we think that the more correct view to take is the view taken by Mr. Justice Devadoss that the petition, although defective in form is in substance sufficient for the purpose of an application under section 73. The purpose of that section obviously is that there should be an equitable distribution of assets between those creditors who have been diligent enough to obtain decrees and put in execution applications before the time such assets have been received, and we must in this case look rather to the substance than to the form of the application in order to administer the equity which the law provides. Agreeing therefore with the view of Mr. Justice Devadoss, we allow this appeal. The decree of the Lower Court is set aside and the District Munsif will pass a decree in conformity with the provisions of section 73. The plaintiff will receive proportionate costs before the Second Appellate Bench and in the Lower Courts. In this Letters Patent Appeal as the other side has not appeared before us the plaintiff will bear his own costs.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Official Assignee of Madras .. *Appellant**

v.

The Devakottah Nagarathar Sri Meenakshi Vidyasala Paripalana Sangam .. *Respondents.*

Official Assignee of Madras *v.* Devakottah Nagarathar Sri Meenakshi Vidyasala Paripalana Sangam.

Trust—Following trust property—One of several trustees misappropriating trust money and utilising it in his own business—Subsequent adjudication of that trustee as insolvent—Right of co-trustees to a charge on the insolvent's estate in priority to other creditors

A person who was a banker and money-lender was one of several trustees of an Endowed School and was entrusted with money belonging to this Endowment by the other trustees He put this money into his own business without the knowledge or consent of his co-trustees Subsequently his business came to a standstill and he was adjudicated insolvent on the ground that his estate could not meet its debts as they fell due, though it had considerable assets outstanding in the form of book debts. The insolvent's co-trustees claimed that they were entitled to a charge on the whole estate of the insolvent in priority to the other creditors.

Held, that the insolvent's co-trustees could follow the trust monies, which had been misappropriated by the insolvent trustee, to the fund in which they must be supposed to have been sunk and, therefore, were entitled to a charge on the whole estate of the insolvent in priority to the other creditors

Pennell v *Deffell,* (1853) 4 De G.M. & G 372, *In re Hallett's Estate,* (1879) 13 Ch D 696 and *Sinclair* v *Brougham,* (1914) A C. 398 referred to
In re Hallett & Co, (1894) 2 Q.B 237 explained.

Principles regarding the following of trust property laid down by Coutts Trotter, C J.

On appeal from the judgment of the Hon'ble Mr. Justice Waller, dated the 20th September, 1927 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Petition No 278 of 1925.

The following is the judgment of Waller, J, dated 20th September, 1927:—

The parties are the Official Assignee representing the firm of M A.R N. on the one side and a member of the Committee of the Nagarathar Sri Meenakshi Vidyasala Paripalana Sangam on the other. The Sangam is a Society registered under Act (XXI of 1860). M.A.R.N. Ramanathan Chetty was a member of the Committee and the treasurer of the Sangam In his capacity as treasurer he collected the various sums subscribed for the school which the Sangam was maintaining. These sums he paid into his firm's business and in 1925 the firm was adjudicated insolvent. At that

*O S. Appeal No. 82 of 1927. 15th March, 1929.

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time there stood to the credit of the trust in his books a sum of over Rs. 40,000. One of the trustees claimed that amount from the Official Assignee. The latter came to the conclusion that the relation between the insolvent and the trust was one merely of debtor and creditor and allowed the trust to rank as an ordinary creditor. Against his order one of the trustees has appealed. Mr. S. Duraiswami Aiyar for the Official Assignee concedes that he is unable to support the view that the relation between the insolvent and the trust was one of debtor and creditor. He admits that Ramanathan Chetty was a trustee and received the trust fund as a trustee and mixed it with the funds of his own business.

I have been taken through a considerable number of authorities, mostly English, but it seems to me that a case like this is exactly covered by S. 66 of the Indian Trusts Act, which runs as follows:

"Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him"

There can be no question as to the wrongful nature of Ramanathan Chetty's action for the mingling itself was wrongful. Mr. S. Duraiswami Aiyar's argument, as I understand it, is this, that the beneficiary is entitled to take the trust money if he can trace it to a specific fund. In other words, if there had been remaining in Ramanathan Chetty's business a balance more than sufficient to meet the claim, the beneficiary would have been entitled to take out of it a sum equivalent to his claim; if the balance were not sufficient to meet the claim he could take it all and rank as an ordinary creditor for the rest, but there must be a balance. I do not myself think that this restricted construction of the word "fund" is correct.

"The guiding principle is that trustee cannot assert a title of his own to trust property . . . that, if a man mixes trust funds with his own the whole will be treated as the trust property except so far as he may be able to distinguish what is his own." (*Firth* v. *Cartland*[1]).

Now, what is the "fund" in this case? The trust money was paid into the business, which has, in the shape of assets, book-debts estimated to be worth some 10 lakhs of rupees. That is, I conceive, the fund contemplated by section 66 of the Trusts Act. The insolvent cannot claim the whole of it as against the beneficiary and I consider that the appellant is entitled to a first charge on the realisations to the full extent of his claim. Mr. S. Duraiswami Aiyar relies on *In re Hallett's case*.[2] The *ratio decidendi* in that case is stated in the head-note. With great respect, I do not think that Lopes, L.J.'s dictum that, if trust money has been mixed up with other money so as not to be distinguishable, it cannot be followed is in accordance with the decision in *In re Hallett's*

1 (1865) 34 L.J. (Ch.) 301. 2 (1894) 2 Q.B. 237.

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Estate. *Knatchbull* v. *Hallett.*[3] The true position is stated in Godefroi on Trusts, p. 575—if the trust money is blended by the trustee with his own the aggregate amount is treated as trust money with the exception of so much as the trustee can identify as his own. What the Master of Rolls said in *In re Hallett*[2] was that there had been no more than a settlement of account and such a settlement could not be followed. Had any money passed, the decision would have been different. In this case the only question to my mind is whether the assets of the business can properly be described as a fund within the meaning of section 66 of the Trusts Act. I would answer it in the affirmative. It seems to me too narrow a construction to insist that there must be an actual balance of money in the hands of the trustee. I allow the appeal and give the beneficiary a first charge for the full amount of his claim on the realisation of the debts due to the business of the insolvent. Taxed costs of the parties on the Original Side scale to come out of the estate. Official Assignee's costs to be taxed as between attorney and client.

S. Duraiswami Aiyar instructed by *V. Varadaraja Mudaliar* for appellant.

V. V. Srinivasa Aiyangar, N. Rajagopala Aiyangar and *Satagopa Mudaliar* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS *The Chief Justice.*—I have so little confidence in my own ability to decide correctly a case involving wide principles of equity, that I am relieved to find that the amount here at stake is sufficient to enable an appeal to be taken to a higher tribunal. I approach this case with much more than the diffidence expressed by Lord Sumner in *Sinclair* v. *Brougham*[4] and feel myself under the ban expressed by Thesiger, L.J., in *Hallett's case*[3] as to the unlikelihood of common law judges even of the eminence of Lord Bramwell being able to understand any but the simplest and most firmly established of equity doctrines.

My duty is simply to set out the facts which are practically undisputed, and to apply to those facts the principles I conceive to be laid down by the decided cases as best I can.

Mr. Ramanathan Chetty was a Nattukottai Chetty carrying on the usual business of a banker and money-lender. He was also a member of a body who conducted the affairs of an Endowed School at Devakottah. A large sum of money was in the hands of the trustees on behalf of the School and they

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2. (1894) 2 Q.B. 237 3. (1879) 13 Ch.D. 696.
4. (1914) A.C. 398.

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entrusted to Ramanatha's custody a part of it amounting to some Rs. 40,000. In respect of that he was clearly in a fiduciary position. He put that sum into his own business without the knowledge or consent of his co-trustees; his business came to a standstill and he was adjudicated an insolvent on 20th July, 1925. The estate was insolvent in the sense that it could not meet its debts as they fell due, but it had very considerable assets outstanding in the form of book-debts, and those assets will doubtless in time be realised. The sole question before us is whether the bankrupt's co-trustees are relegated to the position of ordinary creditors in the insolvency, or are entitled to say that they stand on a higher footing and are entitled to a charge on the whole estate in priority to other creditors on the basis of following their moneys which have been misappropriated to the fund in which they must be supposed to have been sunk.

I have most carefully perused the cases that the diligence of counsel has placed before us; and I wish to express my indebtedness for the assistance they have given us The guiding principles, as I conceive them to be, are laid down in two great judgments—that of Jessel, M.R., in *In re Hallett's Estate. Knatchbull* v *Hallett*[3] and that of Lord Haldane in *Sinclair* v. *Brougham*.[4] I do not propose to examine the early common law cases, though they have been cited to us, because, as Jessel, M.R., points out, the Judges were then dominated by the idea that money being unidentifiable, it could in no case be followed, a doctrine eliminated by "modern equity," to use his own language. I take these propositions to be indisputable; and in stating them I use throughout for brevity the term "trustee" to cover all cases of persons who stand in fiduciary position and "*cestui que trust*" to cover the cases of all those towards whom the persons I have called "trustees" stand in that position.

(1) That if the trustee keeps the sums entrusted to him entirely separate from his own moneys, as by putting them in cash in a bag, to use Sir G. Jessel's instance, or by putting them into a separate account at a bank, the *cestui que trust* can follow them.

(2) That if the trustee can be shown to have converted the trust money into a specific thing such as a piece of land, or a definite parcel of goods remaining in his possession, the *cestui que trust* can take that land or those goods as representing his money or claim a lien on them for the money expended on the

3 (1879) 13 Ch.D. 696

4. (1914) A.C. 398.

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purchase. Then comes the more common case where the trustee has mixed up the trust money with his own. I think here it is clear that

(3) if the trustee has bought land or goods out of moneys which are partly his own and partly those of the *cestui que trust*, the *cestui que trust* can claim a charge on the property for the amount of his funds which was expended in the purchase. That is not always easy of ascertainment, and the working rule appears to be that if the trust moneys have disappeared and no residue is left, the *cestui que trust* will be entitled to a charge on the whole until it is ascertained what proportion of the purchase money was contributed by the trustee out of his own funds and not out of the trust money, the onus being cast on the trustee to prove what portion came from his own funds. When that is ascertained, the *cestui que trust* will only have a lien on the property for the amount ascertained to be due to the misuse of the trust moneys.

Then arises the case where the trust moneys have not only been mixed with the trustee's moneys, but where there is no tangible asset which could be alleged to have been acquired with the trust funds—wholly or partially. That is the case before us, because here what the trustee did was to put the trust moneys in his hands into his own business, and subject them to all the fluctuations of that business and it is clear that the business was so unsuccessful that the actual funds in the hands of the Official Assignee as at this date realized amount to nothing. It was strenuously argued by Mr. Duraiswami Aiyar that in such circumstances the Court could not give a preferential charge over prospective as distinct from actually tangible assets of the business. That argument ultimately seems to me to imply that a trustee has only to put trust moneys into a business, and then and there the *cestui que trust* is debarred from invoking the equitable doctrine, and sinks to the position of an unsecured and unpreferred creditor on the estate. That view seems to me to have been negatived so long ago as 1853 by the judgment of Turner, L.J., in *Pennell* v. *Deffell*.[5] At pp. 388 and 389 the learned Lord Justice takes the very cause we have to consider as a clear illustration of a case to which the equitable doctrine would apply.

We were much pressed with the case of *In re Hallett & Co. Ex parte Blane*.[2] After a careful consideration of that case, I

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2 (1894) 2 Q.B 237

5. (1853) 4 De G.M. & G. 372; 43 E.R. 551.

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think it decides no more than this: that a paper adjustment cannot be treated as a passing of money of the *cestui que trust* into the hands of the trustee. On p. 242 the point is first and emphatically taken by Davey, L.J. Mr. Muir Mackenzie in argument had said: "The £1,600 was in fact received by Hallett & Co." Davey, L.J., then said: "No; all that happened was that they got a credit for that amount." I read the judgments which follow as proceeding on those lines, *viz.*, that while you can follow money, you cannot follow a mere book adjustment.

I think that the learned Judge came to the right conclusion and that this appeal should be dismissed with costs, payable by the Official Assignee out of the Estate. Certificate for two counsel. Official Assignee to take his costs out of the Estate.

Ananta-krishna Aiyar, J.

Anantakrishna Aiyar, J.—M.A.R.N. Ramanathan Chettiar, a Nattukottai Chetty, who was carrying on money-lending transaction under the firm's name of M.A.R N. Ramanathan Chettiar, was a member of the Committee of the Nagarathar Sri Meenakshi Vidyasala Paripalana Sangam and also the treasurer of the Sangam. The Sangam is compendiously called "The Nagarathar School, Devakottah." In his capacity as treasurer, Ramanathan Chettiar collected various sums subscribed for the school which the Sangam was maintaining. He paid these sums into his own business, and in 1925 the firm was adjudicated insolvent. At that time there stood to the credit of the trust in his firm's books a sum of over Rs 40,000 The committee of the Nagarathar School, Devakottah, claimed that the said amount should be paid in full by the Official Assignee in preference to the other debts due to other ordinary creditors of the firm. The Official Assignee passed an order on 25th May, 1927 to the effect that the relationship between the Nagarathar School, Devakottah, and the insolvent was that of a debtor and creditor and no more. The Official Assignee went further and held that

"even assuming for the purpose that the insolvent was in a fiduciary relationship and that he acted improperly in investing the moneys of the school in his firm, the same could not be identified or earmarked. When the firm was adjudicated insolvent there was no cash and no part of the assets could be followed by the beneficiary."

The Official Assignee accordingly held that the School authorities were in no better position than the other unsecured creditors of the insolvent and that they could not claim any preferential payment.

The School authorities appealed to the learned Judge sitting in Insolvency against the order of the Official Assignee. The

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learned Judge (Mr. Justice Waller) allowed the appeal and gave the School authorities a first charge, for the full amount of their claim, on the realisation of the debts due to the firm of the insolvent.

The Official Assignee has preferred this appeal against the order of the learned Judge and contends that the School authorities are not entitled to rank higher than the ordinary unsecured creditors of the insolvent.

Before discussing the question of law raised by Mr. S. Duraiswami Aiyar, the learned counsel for the appellant, I think it is better just to refer to the finding of fact arrived at by the learned Judge. In the course of the judgment the learned Judge has recorded the following admission made before him by the counsel who appeared for the Official Assignee:

"Mr. S Duraiswami Aiyar for the Official Assignee concedes that he is unable to support the view that the relation between the insolvent and the trust was one of debtor and creditor He admits that Ramanathan Chetty was a trustee and received the trust funds as a trustee and mixed it with the funds of his own business."

As a trustee of the Nagarathar School the insolvent was entirely in the wrong in utilising the trust funds in connection with his own business. As the learned Judge remarks

"there can be no question as to the wrongful nature of Ramanathan Chetty's action, for the mingling itself was wrongful."

The question then is whether beneficiary (the school) is entitled to a first charge on the trade assets of Ramanathan Chetty's firm. Section 66 of the Indian Trusts Act (II of 1882) enacts as follows:—

"Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

The learned counsel for the appellant contends that the beneficiary is entitled to a charge for the trust money only if he can trace it to a specific fund. The trust funds have been admittedly utilised by the insolvent in connection with his money-lending business. It is not now possible to say which particular asset due to the firm represents the trust moneys. In these circumstances it is argued for the Official Assignee that the beneficiary is entitled only to rank as an ordinary creditor along with the other creditors of the insolvent. In support of his contention the learned counsel strongly relied on *In re Hallett & Company. Ex parte Blane.*[2] The following passage on page 244 in the judgment of Lord Justice Lopes was relied upon:

"If trust money can be traced, it is liable to be followed by the trustee, and will not pass to the trustee in bankruptcy, but if it has been

2. (1894) 2 Q.B. 237.

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mixed up with other money so as not to be distinguishable, it cannot be followed."

This case, however, has been understood by text-writers as authority for the proposition "that in the case of *money*" there must be in fact a payment, since "the doctrine of following" depends upon identification of the subject-matter; and where money not actually received was credited to an account, the doctrine was held inapplicable.—Godefroi on Trusts and Trustees, 4th Edition, pages 564 and 565.

In Lewin on Trusts, 12th Edition, page 1155 it is stated as follows:—

"In order, however, that the rule as to following trust money should apply, there must be something specific which is capable of being identified as that into which the money has been converted, and where a transaction has been carried out by a set-off in account so that no cheque, note, coin or credit has ever passed or existed in specie, the doctrine is inapplicable."

Turning to the judgment delivered in *In re Hallett & Company's case* [2] we find that Lord Esher (Master of Rolls) says at page 244:

"Hallett & Company did not in truth receive any money; they entered into a transaction with Hewitt and Company, the result of which was that no money passed . . . Hallett & Company did not in fact receive any money or tender of money or anything tangible which it would be possible to follow or to lay hands upon . . . All that can be shewn is a settlement of account, and a settlement of account cannot be followed."

Similarly Lopes, L.J., says:

"So far as regards the following of this sum of 1,600*l*, the attempt fails at the first stage, for that particular 1,600*l* was never received by Hallett and Company; no money had passed; there had been a mere settlement with Hewitt & Company. Then, again, this specific sum never passed on to Cocks, Biddulph and Company; and the second stage fails too."

Similarly at page 245 Davey, L.J., also makes similar remarks:

"This money was not received by them (Hallett and Company) in any sense which is material to the present purpose. Nothing was received by them in specie, notes, cheques or coin; there was no credit existing in specie, nothing which the *cestui que trust* could follow and say that the property had been converted into."

Therefore, the case in *In re Hallett & Co. Ex parte Blane*[2] could be distinguished on the ground that in that case it was found that the very first step that the beneficiary should prove in such cases, namely, that the trustee received moneys of the beneficiary, was not proved. On the other hand authority seems to be fairly clear that where a trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.—*See* section 66

2. (1894) 2 Q.B. 237.

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of the Indian Trusts Act, Halsbury's Laws of England, Vol. 28, page 207, sections 415 and 416.

It was admitted that where trust money is wrongfully laid out in the purchase of specific real or personal property, the beneficiary can elect to have a charge upon it for the amount of the trust money.—*See* authorities referred to in paragraph 415 of Halsbury's Laws of England, Vol. 28.

If therefore the trustee in this case had purchased a going concern of another, with the trust funds, then the beneficiary would have an option either to take the purchased property or elect to have a charge upon it for the amount of the trust money. If, instead of purchasing a going concern, the trustee wrongfully utilises the trust money for starting business, or for carrying on a business of his own, then it would seem that the beneficiary is entitled equally to elect to have a charge upon the assets of the business for the amount of the trust money.

It was, however, contended by the learned counsel for the appellant that the doctrine of following trust property is not applied, and could not in the nature of things apply, when the trust funds are wrongfully applied by the trustee in a trade or business. If the doctrine is not confined in its application to cases of mingling of trust moneys with the trustee's own money where there is a mingled fund available, if the doctrine also applies to cases where with the money of the beneficiary the trustee wrongfully buys other property, and if the beneficiary could in such cases claim to have a charge on such property to the extent of the trust money utilised wrongfully by the trustee, I am not clear why the doctrine should not apply when the trustee instead of utilising the trust money for the purchase of property utilised it in a trade or business of his own.. Having regard to the findings in the present case and to the admission made on the Official Assignee's behalf, as recorded by the learned Judge, there is no difficulty as regards facts in the present case; for, as already mentioned, it was admitted before the learned Judge on behalf of the Official Assignee that

"Ramanathan Chetty was a trustee and received the trust fund as a trustee and mixed it with the funds of his own business"

The learned counsel for the respondent cited to us the case of *Pennell* v. *Deffell.*[5] At page 558 Lord Justice Turner observed as follows:—

"It is, I apprehend, an undoubted principle of this Court, that as between *cestui que trust* and trustee, and all parties claiming under the

5. (1853) 4 De G.M. & G. 372· 43 E.R. 551.

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trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust; and from this principle I do not understand the Master of the Rolls to have in any degree dissented. Several cases illustrating the principle were cited in the argument, but perhaps it cannot be better illustrated than by referring to a case of familiar, almost daily occurrence, the case of trust-monies employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them. The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock-in-trade and debts of the partnership. The stock-in-trade and debts may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital, so continually altered and changed. We have here, I think, the most perfect instance of the extent to which the doctrine of following trust property has been carried by the Court, an instance, too, which exemplifies the difficulties with which the Court has felt bound to grapple for the purpose of carrying out that doctrine, for nothing can be more difficult, nothing more inconvenient, than to follow out such a case to its results."

We are also referred to *In re Hallett's Estate. Knatchbull* v. *Hallett*,[3] to the judgment of Jessel (Master of the Rolls) at page 707 *et seq.* The decision of the House of Lords in *Sinclair* v. *Brougham*[4] was also referred to and several passages from the speeches of the learned Lords who took part in that case were read to us. For example, at page 438 in Lord Dunedin's speech the following passage occurs:

"Now, there are certain situations, of which *Hallett's case*[3] is an example, where the one sharing party has a right to say to the other, It is not in your mouth to say that the assets are not all mine, to the extent of my full claim. I do not think this is one of those positions. Neither party is here in any fiduciary position to the other."

Similarly passages at page 418 in the speech of the Lord Chancellor (Viscount Haldane) were also read to us.

I think that some of the passages occurring in the above case could be construed as laying down the principle contended for by the respondent, though it may be said that the point for decision before the House was quite a different one and that the learned Lords were not considering the exact point now before the Court.

In Perry on Trusts, 6th Edition, Vol. II, paragraph 828, page 1364, it is said that

"to entitle the trust creditor to preference, it must at least appear that the funds remaining for distribution contains the proceeds of the trust."

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3. (1879) 13 Ch.D. 696. 4 (1914) A.C. 398.

Again in paragraph 838 it is mentioned that

> "if the executor of a deceased partner is also the surviving partner and he continues the deceased partner's capital without authority in the business, and changes the property many times over, the Court follows the trust fund through all these changes and gives the beneficiaries of the deceased partner's estate the capital and all its proceeds or gains in the business in which it has been employed "

The only Indian case, I am aware of, which is somewhat similar to the present case, is *Mulrazu Lakshmi* v. *Official Assignee of Madras*[6] decided by Sadasiva Aiyar and Napier, JJ., where a jeweller, who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him, converted the same into cash and subsequently became bankrupt, and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt, the Court held that the transaction between the claimant and the jeweller amounted to a bailment and the jeweller became, in consequence, a trustee for the claimant in respect of the sovereigns and gold entrusted to him. But as there was no evidence, in that case, that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the Court held that the claimant was not entitled to the benefit of the doctrines of tracing and *quasi*-charge, and therefore to any preferential payment.

Justice Sadasiva Aiyar at page 41 says:

> "If, in this case, I could have found my way to decide that the assets taken possession of by the Receiver or by the Official Assignee did include or must have included the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, I would be inclined to apply the doctrine of tracing and the doctrine of *quasi*-charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lords' case, but I do not see my way to differ from the finding of Mr Justice Bakewell that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Receiver or by the Official Assignee "

Again the learned Judge adds:

> "On the finding, then, that none of the assets found with the insolvent is proved directly or even by a remote fact, from which a reasonable inference could be drawn, to have contained any portion of the petitioner's gold or to have been acquired with the use of the proceeds of that gold, I must and do confirm the order of the learned Judge "

The principle would seem to be that a wrong-doer cannot be permitted to take advantage of his wrong and that no wrong-

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6. (1915) 29 I.C. 37.

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Anantakrishna Aiyar, J.

ful act of the trustee could prejudice the rights of the beneficiaries in cases like the present.

I am therefore of opinion that the learned Judge was right in holding that the principle of following trust property applies to the facts and circumstances of the present case. I would therefore dismiss the appeal with costs. Costs to be realised from the Estate. Certificate for two counsel. The Official Assignee is entitled to take his costs out of the Estate.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS-TROTTER, *Kt., Chief Justice* AND MR. JUSTICE JACKSON

V. Alagappa Chetty & Co. by its partners and others .. *Appellants**

v.

Roopchand Chabildoss & Sons .. *Respondents*

Alagappa Chetty & Co. v. Roopchand Chabildoss & Sons.

Indian Contract Act (IX of 1872), S. 91—Scope of—Freedom of parties to contract to the contrary—Implied contract—Course of dealing between the parties

Section 91 of the Indian Contract Act does not impose a legal restriction on the freedom of buyer and seller to make their own arrangements as to the terms on which the goods are to be delivered to a carrier for transit from seller to buyer The section is only applicable to cases where there is no specific arrangement or uniform course of dealing between the parties that posits the absence of any such condition of liability against the carrier being secured.

On appeal from the judgment of the Hon'ble Mr. Justice Beasley, dated 21st December, 1926 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 353 of 1926.

V. V. Srinivasa Aiyangar, K. V. Krishnaswami Aiyar and *N. Swaminathan* for appellants.

Vere Mocket instructed by *G. Rajagopalan* and *N. T. Shamanna* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *The Chief Justice.*—Mr. Justice Beasley described this as one of the most mysterious cases he ever had tried before him. As it unfolded itself, at the trial, it may well have been so, but he, I think, has so completely solved the mystery himself, that it is a mystery no longer. The facts necessary for

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*O.S. Appeal No. 28 of 1927. 11th December, 1928.

Alagappa Chetty & Co. v. Roopchand Chabildoss & Sons.

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our purposes can be summarised briefly. The plaintiffs and the defendants are both dealers in silver, the plaintiffs' place of business being in Madras and the defendants' place in Salem. The defendants from time to time telegraphed to the plaintiffs asking them to send them consignments of metal for the purpose of their business in Salem and they had done so for a number of years. It is in evidence that 22 such transactions relating to consignments of silver had taken place within the last few years. In each one of them, the procedure was the same. The plaintiffs on receipt of the telegram of request bought silver in the Madras Market in the form of bars or ingots, cut them up and then packed them, when so cut up, into a wooden box which was then wrapped in a gunny bearing the address of the buyer at Salem and sealed in several places with the sellers' seal. The package was then taken by one of the plaintiffs' servants to the Railway Station and handed over to the Railway Company for despatch by train to Salem. In every single case on record, the boxes were sent on Owner's Risk Note, which of course is the cheapest rate available and protects the Railway Company from liability in the event of loss in transit. In this particular transaction a bar of silver was ordered by the defendants by a telegram of the 8th April, 1926, Ex. C, in the case. The plaintiffs went into the market forthwith and bought a bar and sent it by a reliable servant, on its being packed and put in a gunny wrapper, to the Station to catch the evening mail. In the ordinary course, it would reach Salem at about 4 o'clock in the morning, the train leaving Madras at 7-30 or 9 P.M. and would be for some hours in the parcel office at Salem awaiting despatch to the consignee, the defendants, when the business hours began. A parcel was in fact taken by the Railway carting contractors and tendered to the defendants at their place of business at about 9 o'clock. That parcel was rejected by the defendants as being obviously not what was said to have been despatched as it was far too light. The box in the plaintiffs' place of business in Madras weighed 39 seers, roughly equivalent to 92 lbs. Avoirdupois. There were other signs of suspicion on the enclosing gunny. The defendants having rejected the parcel, the plaintiffs declined to have anything to do with it either, and it remained in the custody of the Railway Company unopened until the trial of the suit brought by the sellers, when it was opened in the presence of Mr. Justice Beasley in Court.

There can be no doubt that if the seller did deliver the box to the Railway Company in Madras with a silver bar in it,

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there must have been a substitution *en route* because that which was opened in Court, and which undeniably was that which was tendered to the defendants in Salem, contained some worthless scrap iron. Mr. Justice Beasley very carefully threshed out the whole evidence and came to the conclusion that somebody made up a dummy box to look as nearly as possible like the box that was expected and had managed to substitute it for the box that came by train while it was in the Parcel's Office at Salem, taking away the real box containing the bar of silver and leaving the box of scrap iron in its place. I entertain no doubt that Mr. Justice Beasley was right in supposing that infinitely the most probable thing is that that substitution was made in the Parcel's Office at Salem. It also follows that it must have been made by one of the employees of the defendants as it obviously had to be made by some one who knew of the despatch and expected receipt of the box. He also pretty clearly must have got hold of a gunny which had been used in the transit of a former package from the plaintiffs to the defendants. But, it is not really necessary to speculate as to how and where the loss took place, provided we are satisfied that the real parcel was in fact delivered into the hands of the Railway Company at Madras and that the substitution did not take place before that. The evidence of the weighing clerk at the Central Station (which the learned Judge accepted), where he noted on the Bill that the weight was 39 seers, is conclusive as to this and I entirely agree with the learned Judge that the notion that the substitution had taken place in Madras before despatch is altogether untenable.

If that be so, *prima facie* the plaintiffs have made a good delivery to the defendants, because they had given delivery to the carrier, namely, the Railway Company, and if this is effectively done, the loss rests upon the buyer. These goods were sent at owner's risk, which after despatch on transit means, of course, the buyer's risk. If that was done which was contemplated to be done by the parties to this contract, it is quite obvious that both these parties contemplated that the goods would be delivered to the Railway on the terms of an Owner's Risk Note. That was the uniform course of business between the parties. The defendants never attempted to suggest that they wanted additional precaution, a rate of freight-covering insurance, and the course of dealing covering 22 transactions over several years is as good as to say that that was the contract between the parties, as much as if it had been embodied in a written document covering this particular consignment. Notwithstanding this, it is solemnly argued

that the buyer is protected by the terms of section 91 of the Indian Contract Act (IX of 1872), which runs as follows:

> "A delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods"

I am no admirer of the Indian Contract Act, but I cannot believe that it was seriously intended to impose a legal restriction on the freedom of buyer and seller to make their own arrangements as to the terms on which the goods were to be delivered to a carrier for transit from seller to buyer. The section is only meant and could only be meant to apply to cases where there is no specific arrangement or course of dealing between the parties that posits the absence of any such condition of liability against the carrier being secured. I am unable to see that the defendants' contention on this section is even arguable.

The result is that the plaintiffs' suit was well founded and the appeal must be dismissed with costs.

It is lamentable to think that these foolish people by each in turn refusing to examine the parcel that was tendered at Salem effectually prevented the Railway Company or the Police from having any real chance of tracing the theft and recovering, as they might have done, the stolen goods or any portion of them. They have also spent a very great deal more money than the original value of the goods in this litigation.

The appeal is dismissed with costs.

Jackson, J.—The effect of the contract between the parties that the goods were to be sent at owner's risk would be, I think, that, notwithstanding the provision in section 91, Indian Contract Act, the delivery to the carrier held good as a delivery to the buyer.

It is argued on the contrary that the parties by agreeing that the carrier should not be held responsible, agreed, with an eye to the terms of section 91, that the delivery to the carrier should not count as a delivery to the buyer. But if that were so the seller who would be undertaking the risk of loss in transit would charge the buyer the cost of insurance. No such charge figures in the dealings between the present parties, and therefore I have no doubt that they intended the buyer to carry the risk, and the delivery to the carrier at owner's risk to be a delivery to the buyer.

N S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Vasudeva Mudali and others . *Appellants** (*Prisoners*).

Vasudeva Mudali, *In re.*

Indian Penal Code (XLV of 1860), Ss 40, 141 and 149—Indian Railways Act, Ss. 127 and 128—Assembly of men with the common object of committing offences under the Indian Railways Act—If unlawful—Offences proved to be committed by some members of the assembly—Others whether constructively guilty—"Offence" in Ss. 141 and 149—If includes offence under the Indian Railways Act

Where a large body of men assemble with the common object of obstructing a railway line and throwing stones at the trains and thereby committing offences under Ss 127 and 128 of the Indian Railways Act, they form an unlawful assembly under S 141 of the Indian Penal Code, as the word "offence" in the latter section is made to include an offence under a special law like the Indian Railways Act by S. 40 of the Indian Penal Code But, if the members of the assembly proceed to carry out their common object and to commit offences under the two sections of the Indian Railways Act, only such of those who are proved themselves to have committed those offences can be convicted and the others cannot be said to be constructively guilty under S 149 of the Indian Penal Code, as the word "offence" in this section is confined to offences under the Indian Penal Code by section 40 of the Code

Appeal against the order of the Court of Session of the Chingleput Division in Case No 21 of the Calendar for 1928.

V. L. Ethiraj and *D. Ramaswami Aiyangar* for appellants

K. N. Ganapathi for *The Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT.—This appeal relates to an occurrence arising out of the strike on the S. I. Ry. in July last. All of the seven appellants have been convicted of offences under section 147 of the Indian Penal Code and section 127 of the Railways Act. The first appellant has been further convicted of an offence under section 128 of that Act and the other appellants have been convicted of the same offence with reference to section 149, Indian Penal Code.

The first objection taken is that the word "offence" in section 149 being confined to offences under the Penal Code, the conviction of the second to seventh appellants under section 128 of the Railways Act with reference to that section is illegal. That has been held in *Aydrooss* v. *Emperor*[1] and *In re Puvanur Athammu.*[2] We have considered the question at length

*Cr. Appeal No 707 of 1928. 11th March, 1929

1. (1922) 17 L.W. 21. 2. (1924) 20 L.W. 914

and with care and find ourselves constrained to say that those decisions are right. The position is curious and unsatisfactory. A large body of men set out to obstruct a railway line and to throw stones at trains. They form an unlawful assembly; for by section 40 of the Penal Code, the word "offence" in section 141 includes offences under any special law. If, however, the rioters proceed to carry out their common object and to commit offences under sections 127 and 128 of the Railways Act, you can convict only those of them who are proved themselves to have committed those effences The rest are not constructively guilty, as section 149 cannot be invoked against them although the offences committed are the very offences they set out to commit and were committed in prosecution of their common object.

This being the legal position we must acquit the second to seventh appellants on the second count of the indictment. The third count which relates to the charge under section 127 of the Railways Act has also been framed with reference to S. 149, Indian Penal Code. All of the appellants must be acquitted on it also. As regards the charge of rioting, there is ample evidence to connect all of the appellants with the unlawful assembly and the convictions on that charge must be sustained. There is also plenty of evidence that the first appellant committed an offence under section 128 of the Act. This conviction must be confirmed.

The result is that the sentences of six months' rigorous imprisonment passed on all of the appellants under section 147, Indian Penal Code, are confirmed. The sentences passed on the second to seventh appellants under sections 127 and 128 of the Railways Act are set aside. The sentence passed on the first appellant under section 128 of the Railways Act is confirmed and it will run concurrently with the other sentence passed on him. The sentence passed on him under section 127 of the Railways Act is set aside. The fourth to seventh appellants will be recommitted to serve the unexpired portion of their sentences.

N.S. *Sentences modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Jethaji Peraji Firm by Agent Maggaji .. *Appellant**

v.

Tirupuramallu Krishnayya (dead) and others .. *Respondents*

(39th Creditor—Insolvent).

Jethaji Peraji Firm *v.* Krishnayya.

Provincial Insolvency Act (V of 1920), S 43—Annulment of adjudication under—Obligatory or discretionary, in absence of application for enlargement of time allowed for applying for discharge—Extension of such time—Power of, on application made before expiry of time originally allowed and thereafter—S 27 (2)—Control of S 43 by—Annulment of adjudication under S 43—Insolvency proceedings if wholly put an end to by—Application for annulment of adjudication during pendency of application by Receiver under S 54—Recourse to provisions of S. 37 of Act in case of—Power and discretion of Court as to—Receiver's right to continue petition under S 54 when property vested in him under S 37—"Acts" in S. 37—Meaning of—Statute—Provision of—Mandatory or directory—Test—Mandatory provision—Departure from—Court's power of.

Three brothers were adjudicated insolvents, and the order of adjudication fixed a period within which they were to apply for their discharge. The Official Receiver commenced a proceeding under S. 54 of the Provincial Insolvency Act for the annulling of a mortgage which had been executed by the insolvents prior to their adjudication The inquiry on that petition went on from time to time and the petition stood adjourned to 1st May, 1924. On 30th April, 1924 a creditor applied under S 43 of the Act for the annulment of the order of adjudication, on the ground that the debtors had not applied for their discharge within the time fixed On 1st May, 1924 the Judge adjourned the petition under S 54 to 28th July, 1924; and on that very date an order was made on the petition under S 43 calling for a report from the Official Receiver The petition under S 43 came on 3rd May, 1924, and the District Judge made an order annulling the adjudication. On 28th July, 1924, to which the petition under S 54 stood adjourned, the Judge dismissed that petition on the ground that it lapsed automatically

Held, that the Judge ought to have made use of the provisions of S 37 of the Act, and ordered the debtors' property to vest in the Official Receiver.

Held further, that the effect of an order vesting the property in the Official Receiver under S 37 of the Act would be to entitle him to continue the proceeding instituted by him under S. 54 of the Act

Per Venkatasubba Rao, J.—The expression "shall be annulled" in S 43 of the Act is not mandatory but is directory only That section is controlled by S 27 of the Act; and if, before the expiry of the term fixed for applying for discharge, an application is made under S 27 (2), it is not obligatory upon the Court under S 43 to annul the adjudication The adjudication does not get automatically annulled under S. 43 on the expiry of the original period The Insolvency Court has power, on an application made under S 27 (2) at any time before the adjudication is annulled under

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*A.A.Os Nos 310 to 313 of 1925, etc. and C.R.Ps Nos. 627, 628 of 1924 and 173 and 174 of 1925. 17th January, 1929

S. 43, though after the expiry of the term originally fixed, to extend the period within which the debtor could apply for his discharge. Jethaji Peraji Firm v. Krishnayya.

Quaere: Whether the Insolvency Court can *suo motu* refuse to make an order under S 43 if it thinks there are sufficient grounds for adopting that course.

Per Reilly, J.—Quaere: Whether the time fixed for the debtors' application for their discharge can be extended by the Court after its expiry.

The expression "shall be annulled" in S. 43 is mandatory and not directory only, and, in the circumstances of the case, the District Judge had no discretion to refuse to make an order of annulment.

Test to determine whether a provision in a statute is mandatory or is directory only.

Circumstances under which the Court can depart from a plain and mandatory statutory provision.

Per Venkatasubba Rao and Reilly, JJ—The insolvency proceedings do not always stop at the moment of annulment.

The view of Wallace, J, in *Tummappa* v *Devasi Harpal,* (1929) M.W N 22 that an annulment of adjudication under S 43 puts an end to the insolvency proceedings as a whole dissented from.

The word "acts" in S 37 of the Act is wide enough to include the receiver's act of avoidance under S 51. The effect of the saving in S. 37 is to preserve the validity of the receiver's exercise of his option of avoidance.

Appeal against the order of the District Court of Guntur, dated 3rd May, 1924 and made in I.A. No. 144 of 1924 in I P. Nos. 12 and 16 of 1921.

The Advocate-General and *V. Govindarajachari* for appellant.

S. Srinivasa Aiyangar, B. Somayya, M. Ranganatha Sastri and *Kasturi Seshagiri Rao* for respondents.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—Several connected appeals and revision petitions have been argued before us, but, in my opinion, C.M.A. Nos 310, 311 and 312 of 1925 really raise the question of substance which presents itself for decision. If we decide these appeals in favour of the appellants there, our decision in them governs the other cases and the contentions raised in the latter by the respondents seem beside the point. Shortly stated, the question we have to decide relates to the construction and effect of sections 43, 37 and 27 of the Provincial Insolvency Act of 1920. Venkatasubba Rao, J.

The facts are undisputed and I shall briefly state them. Three brothers were adjudicated insolvents, first on their own petitions and subsequently on petitions filed by certain creditors. The orders of adjudication were passed on the debtors' petitions by the Official Receiver on the 25th of November, 1921 and he fixed 18 months as the period within which the debtors were to apply for their discharge. The same debtors were subsequently adjudicated by the District Judge on the 12th of

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Venkatasubba Rao, J.

December, 1921 and the period fixed by him was 12 months. Pausing here for a moment, one fails to understand how two such sets of parallel orders came to be made; but this curious irregularity has no bearing on the question we have to decide. The total liabilities shown amount to over 2¼ lakhs. The insolvents had, on the 10th January, 1921, executed a mortgage in favour of certain creditors, whom I shall in this judgment, call the mortgagees, for about Rs. 60,000 and it is said that the mortgage deed comprises the bulk, if not the whole, of the insolvents' property. In the Insolvency Petition, a proceeding was commenced by the Official Receiver under section 54 for the annulling of the mortgage. He filed his petition under that section on the 20th of April, 1922. Its trial began on the 1st of February, 1923, and became a protracted one, the evidence being recorded piecemeal from time to time. In fact, from the 1st of February, 1923 to the 1st of May, 1924, that is, for 15 months, witnesses were examined off and on, but the trial was not, even on the last-mentioned date, concluded. I may mention that the evidence of 10 witnesses for the petitioner and 3 for the respondents had by then been taken. On the 30th of April, 1924, a creditor by name Krishnayya applied under section 43 that the orders of adjudication might be annulled on the ground that the debtors had not applied for their discharge within the time fixed. The date chosen for making the application is significant. On the 24th of April the petition under section 54 was adjourned to the 1st of May. The application to annul the adjudication was made, as I have said, on the 30th of April, that is, the day previous to the date fixed for the hearing of the substantive petition On the 1st of May, I have already stated, the Judge heard the petition for annulling the mortgage. Curiously enough, on that very date, without notice to, or knowledge of, the creditors, an order appears to have been made on Krishnayya's petition directing the Official Receiver to submit a report. This petition came on the 3rd of May, 1924 and the District Judge made an order annulling the adjudication It must be noted that the petition under section 54 stood adjourned from the 1st of May to the 28th of July. It was between these two dates, that is on the 3rd of May, that the adjudication was annulled. It is surprising that when this order was made without notice to creditors, the fact was overlooked that there was pending on the file of the Court the petition under section 54 which was being hotly contested. So far as the record goes the Official Receiver does not appear to have taken any steps to safeguard the in-

terests of the general body of creditors This led to the strange result that the adjudication was unconditionally annulled. I use the words "strange result" advisedly The order under section 43 was made presumably to punish the debtors. But in this case the persons who are prejudicially affected are not the debtors but the creditors generally. Another unexpected result of that order is, that the petition under section 54 was held to have lapsed automatically and the mortgage, which was the subject of attack, became, for the time being, valid and final. The very object of the Insolvency Petitions, so far as the creditors collectively were concerned, became frustrated, for it cannot be gainsaid that the creditors started the proceedings, mainly if not solely, for the purpose of getting rid of the mortgage. The rest of the story may be briefly told. Several creditors applied to the District Judge for review of the orders made under section 43 and the review petitions were dismissed. As a necessary result, the Judge held that the petition to annul the mortgage under section 54 lapsed and that petition was accordingly dismissed.

The general body of creditors (whom I shall refer to as appellants) attack these orders of the learned District Judge, whereas Krishnayya and the mortgagee support them. It is contended for the appellants that the word "shall" in section 43 is not used in a mandatory sense, but must be held to be directory only. The argument is put thus: Generally, no doubt, it is the debtor that is punished by the annulling of the adjudication. The very terms of the section show that what is intended is in the nature of a penalty to the insolvent. If the adjudication is annulled, the section provides that the Court may recommit the debtor to his former custody and that he shall be subject to all the processes that had previously been in force against him But there may be cases where, if no discretion is left to the Court, the very opposite of what is intended may result. In this case, it is asked, how are the insolvents really prejudiced by the orders? The parties who profited by them are the mortgagees, that is to say, the creditors fraudulently preferred. The honest creditors, on the contrary, have been seriously prejudiced. Can this be the intention of the section?

I shall now deal with this contention. Section 43 provides that if the debtor fails to apply for his discharge within the period specified by the Court, the order of adjudication shall be annulled The learned Advocate-General contends for the appellants that the word "shall" is directory and the expression

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"shall be annulled" means "shall be liable to be annulled" Section 43 is, in my opinion, controlled by section 27 which reads thus:

> 27. (1) "If the Court does not dismiss the petition, it shall make an order of adjudication and shall specify in such order the period within which the debtor shall apply for his discharge."
>
> (2) "The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge, and in that case shall publish notice of the order in such manner as it thinks fit"

From these two sections read together, it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has the power to extend the period and it may be so done, not merely at the instance of the debtor but on the application of anybody interested. The section merely requires that sufficient cause shall be shown, but it does not say that the debtor alone may apply for extension or shall show sufficient cause. If then, before the expiry of the term fixed, an application is made under section 27 (2) it is obvious that it is not obligatory upon the Court under section 43 to annul the adjudication. To this extent it is plain that the word "shall" is not imperative. *In re Lord Thurlow. Ex parte Official Receiver*[1] is an authority on this point. In that case, the Court of Appeal held, the expression "shall adjudge" in section 20, clause (1) of the Bankruptcy Act, 1883, to be directory and not mandatory, on the ground that a discretion was left to the Judge under the words of another section, namely, section 105 (2), which contained a provision to the effect that the Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

Then comes the question, supposing the Court is moved under section 27 (2), after the expiry of the time originally fixed, but before the adjudication is annulled under section 43, has the Court the power to extend the period within which the debtor could apply for his discharge? In the first place, I must observe that the adjudication does not get automatically annulled under section 43 on the expiry of the original period. The words of the section show that the Court must make an order of annulment. This is the correct interpretation of the section and *Abraham* v. *Sookias*[2] supports this view. Next, section 27 (2) while saying that the Court may extend the time, does not say in express terms that it may be extended either *before or after the expiration* of the period originally

1. (1895) 1 Q B 724

2 (1923) I L R. 51 C 337

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fixed. Section 148 of the Civil Procedure Code enacts that the rule to be applied under that Code is that the time may be enlarged irrespective of the fact that the application is made either before or after the expiry of the period originally specified. It is unnecessary to decide whether by reason of section 5 of the Provincial Insolvency Act section 148 of the Code is attracted or not; for *Badri Narain* v. *Sheo Koer*[3] establishes clearly that the power of the Court is not fettered in the way suggested. That case was decided under the old Code which did not contain a provision similar to section 148. I am, therefore, disposed to hold that it is open to the Insolvency Court under section 27 (2) to extend the time on a proper application to that effect made at any time before the adjudication is annulled under section 43. This is the view taken by Krishnan, J., in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar*,[4] by Devadoss and Wallace, JJ., in *Abbi Reddi* v. *Venkata Reddi*[5] and by the present Chief Justice in *Manikkam Pattar* v. *Vanchappa Chettiar*.[6] The Lahore High Court has taken the same view in *Lakhi* v. *Molar*[7] and *Fateh Muhammad* v. *Maya Das*[8]; the Burma Court in *K.K.S.A.R.A. Chettiar* v. *Maung Hya Tha*[9] and the Calcutta High Court in the case already cited, *Abraham* v. *Sookias*.[2] A different view was taken by Waller, J., who, differing from Krishnan, J., held in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar*[4] that the Court has no such power. To the same effect are the decisions in *Venugopala Chariar* v. *Chinnulal Sowcar*,[10] *Tirumala Reddi* v. *Kolamula Thomasu Reddi*[11] and *Ramakrishna Misra, Ex parte*.[12] There is thus a conflict of authority on this point. But I am in favour of holding that, on the right construction of the two sections [section 43 and section 27 (2)] in the light of *Badri Narain* v. *Sheo Koer*[3], the Court may enlarge the time even though the application is made after the expiry of the period originally fixed. Thus, in this case again, the terms of section 43 are not imperative or obligatory.

I have so far dealt with two classes of cases but over and above these there remains a third, namely, what has actually arisen in this insolvency. If, before the District Judge made his order under section 43, there was before him an application

2 (1923) I.L.R. 51 C. 337
3 (1889) L.R. 17 I.A. 1: I.L.R. 17 C. 512 (P.C.)
4 (1923) 19 L.W. 418
5 (1925) 51 M.L.J. 60
6 (1928) M.W.N. 441
7 (1925) 86 I.C. 115
8 (1926) 100 I.C. 134.
9. (1926) 6 Bur. L.J. 5
10. (1926) 51 M.L.J. 209
11. (1927) 54 M.L.J. 344.
12 (1924) I.L.R. 4 Pat. 51.

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to extend the time, he would have, as I have said, a discretion to enlarge the period, and in the circumstances of this case he would have exercised it properly by granting an extension. There are other provisions in the Act under which the debtor can be punished while an adjudication still remains in force For one thing, his protection may be revoked while the proceedings may be continued for the benefit of the creditors. In this case, I cannot help remarking that the Official Receiver failed in his duty by not asking for an extension However that may be, the question is, is section 43 to be construed as peremptory in the absence of an application before the Judge under section 27 (2)? In other words, can the Judge *suo motu* refuse to make an order under section 43 if he thinks there are sufficient reasons for adopting that course? The learned Advocate-General argues that even in such a case the section is not mandatory. There is no authority and I wish to reserve my own opinion on the point, for, I can rest my judgment for the appellant on a much firmer ground.

Section 43, after saying that the order of adjudication shall be annulled, adds that the provisions of section 37 shall apply. That section runs thus:

> 37 (1) "Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or Receiver, shall be valid, but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare"

Under this section it was open to the Court to have directed the insolvent's property to vest, for the creditor's benefit, in some person named for the purpose. This is not disputed. That is the order that, in the circumstances, ought to have been made. Had such a conditional order been made, though it would have revoked the status of the debtors as insolvents, it would not have *proprio vigore* put an end to the insolvency proceedings by legal implication. The District Judge held that, as the annulment of adjudication had the effect of terminating the insolvency petition, the proceeding instituted by the Receiver under section 54 in that petition lapsed as a matter of course. But this result could have been avoided. For, if, as I have said, action had been taken under section 37, the annulment would not have been unqualified or absolute and in that case the Court would still retain control over the insolvent and his assets. The scheme of the Act shows that in certain cases the annulling of adjudication does not necessarily lead to the finally

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putting an end to the insolvency petition. This, in my opinion, is the correct view and I am supported by *Ex parte Lennard. Re Chidley*[13] and *Timmappa* v. *Devasi Harpal*.[14] In the last mentioned case the question arose: What was the effect of an order under section 39 annulling adjudication which was made consequent on a scheme of composition approved by the Court under section 38? It was held that the order did not bring the insolvency petition to an end and that the Court, although the adjudication was annulled, continued to retain control over the insolvent's assets. I entirely agree with that decision and the point is fully dealt with in the judgment of Wallace, J. But there is one observation made by the learned Judge—an *obiter dictum*—with which I do not agree. While holding that an order of annulment under section 39 does not terminate the petition (that was the point that directly arose), the learned Judge incidentally observed that under section 43 the case would be different. If what Wallace, J., meant was that an unconditional annulment under that section would bring an insolvency petition to an end, that is a proposition to which no exception can be taken; and, in my opinion, that is all that the learned Judge could have meant.

Now, turning to *Ex parte Lennard. Re Chidley*,[13] the facts are these: A composition scheme provided for the annulment of the bankruptcy and the assignment by the debtor of all his personal property to the trustee to secure the composition. The scheme having been approved and the bankruptcy annulled, a question arose whether the rights of an execution creditor under an execution that was void in the bankruptcy revived upon the annulment. The Registrar granted an injunction restraining the creditors from proceeding with their execution. It was contended that the Court had no jurisdiction, the bankruptcy having been annulled. The Court of Appeal overruled the objection. James, L.J., observes:

> "I am of opinion that under sections 28 and 72 of the Bankruptcy Act, 1869, the Court of Bankruptcy has jurisdiction to determine all questions which may arise in the case of a scheme of arrangement . . But here, though the bankruptcy has been annulled, the composition was made in bankruptcy by the Court itself as part of a scheme which was approved by the Court The order was therefore made in what continued to be a matter of bankruptcy and the question was a question to be decided under section 72 for for the purpose of making a complete distribution of the property."

At this point, a passage from Williams' Bankruptcy, 13th Edition, may be quoted. The learned Author while commenting

13 (1875) 45 L.J. (Bk) 49. 14 (1929) M.W.N. 22.

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on section 29 of the English Bankruptcy Act (which contains a sub-clause on which section 37 of our Act is modelled) says thus:

"Although in cases where the annulment is on the ground that the adjudication ought never to have been made, the Court will in all respects try to remit the bankrupt to his original position, yet in cases where the annulment is, as it is under section 21, *a continuance of the bankruptcy in another form,* the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the bankruptcy" (Page 135)

Assuming then that, in the events that have happened, section 43 was mandatory, the District Judge ought to have made a conditional order under section 37.

I would, therefore, in C M.A. Nos. 310, 311 and 312 of 1925 set aside the order of the District Judge and under sections 43 and 37 annul the adjudication of the insolvents, subject to this condition, that their property shall remain vested in the Official Receiver.

The result of the view I have taken is, the insolvency petition not having come to an end, the proceeding started by the Receiver under section 54 must be deemed to be pending; and the Lower Court is directed to complete the enquiry and dispose of the petition according to law in the ordinary course.

It only remains to add that section 37, which deals with the consequences of annulling, validates all *acts* done previously by the Official Receiver. The word "acts" is wide enough to include the Receiver's act of avoidance under section 54. "Void" in that section has been held to mean "voidable," that is, it is open to the Official Receiver, as representing the creditors, to disaffirm the transaction (the fraudulent preference) The effect of the saving in section 37 is to preserve the validity of the Receiver's exercise of his option of avoidance The result is, now that I have held that the insolvency petition has not been brought to an end, the proceeding under section 54 subsists and can be continued.

I make an order accordingly in C.M.A. No 313 of 1925. This is scarcely an independent order, for, as a matter of fact, it follows as a consequence from the orders already made in C.M A. Nos. 310, 311 and 312 of 1925.

These orders will really suffice to dispose of all the matters before us. In that view I make no separate orders on C R P. Nos. 627 and 628 of 1924 and 173 and 174 of 1925

In regard to costs, though collusion between Krishnayya and the mortgagees may be suspected, it cannot be said that either

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of them acted wrongly. I, therefore, direct that each side shall bear its costs of these appeals and petitions.

Mr. S. Srinivasa Aiyangar says that his client was brought on the record as alienee who acquired the interest at a Court sale of the mortgagees, Bhadri Narain and Soorja Narain. He contends that he is protected by section 54 (2). This is a question which must be left to be decided by the Lower Court when it disposes of the petition under section 54.

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Reilly, J.—In these cases the insolvents did not apply for their discharge within the time specified; nor was any application made either before or after the expiry of that time for its extension. That being so, I do not wish to express any opinion on this occasion on the question whether the time specified can be extended by the Court after its expiry. But in the circumstances stated the District Judge was bound in my opinion under section 43 of the Provincial Insolvency Act to annul the adjudication. In the decisions of this Court on the question culminating in *Tirumala Reddi* v *Kolakula Thomasu Reddi*[11] the weight of authority is clearly in favour of the view that the words "shall be annulled" in section 43 of the Act are mandatory. But in *Manikkam* v. *Nanchappa*,[6] where the question was not decided, the learned Chief Justice suggested that another view was possible and referred to *In re Lord Thurlow, Ex parte Official Receiver*[1] as deciding that a similar provision in the English Bankruptcy Act was not mandatory. The learned Advocate-General has relied strongly on *Lord Thurlow's case*[1] in support of his contention that the expression "shall be annulled" in section 43 of the Provincial Insolvency Act is not mandatory but directory, and that in this case the adjudication should not have been annulled. But, when we examine *In re Lord Thurlow. Ex parte Official Receiver*[1] I doubt with great respect whether the learned Chief Justice was right in suggesting that the Court of Appeal was there interpreting an exactly similar provision of the English Bankruptcy Act. In that case the statutory meeting of creditors eventually passed no resolution, and it was contended for the appellant (the Official Receiver) that under section 20 (1) of the Bankruptcy Act, 1883, in those circumstances it was obligatory to adjudge the debtor bankrupt forthwith. The Court of Appeal decided that it was not obligatory on the Registrar to make the order of adjudication forth-

1 (1895) 1 Q B. 724.

6. (1928) M.W.N 441.

11 (1927) 54 M L.J. 344.

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with but that he had power to adjourn the matter. It was not explicitly set out in section 20 (1) of the Bankruptcy Act, 1883, that, if the meeting of creditors passed no resolution, the debtor should be adjudged bankrupt forthwith, and even taking that section by itself I doubt whether "shall adjudge" was a mandatory provision which left the Court no discretion to do anything except to adjudge the debtor bankrupt forthwith; it appears to me rather to set out that the next step in the procedure was to make the order of adjudication. However all the members of the Court of Appeal called to their aid another section of the Bankruptcy Act, section 105, which provided that the Court might at any time adjourn any proceedings before it, and reading that section with section 20 (1) they had no doubt that the Registrar was not bound by section 20 (1) to adjudge the debtor bankrupt forthwith And it must be noticed that Rigby, L.J., indicated that he would have regarded the provision in S 20 (1) by itself as obligatory and was only saved from doing so by reading it with section 105; and even Lord Esher, M.R., eventually came to the conclusion that it was obligatory subject to the power of adjournment. Although it appears to me that, even taking section 20 (1) of that Act by itself, the provision "shall adjudge" was not mandatory in the sense that in the circumstances stated the Registrar was bound to adjudge the debtor bankrupt forthwith, it is clear that the Court of Appeal did not decide that by themselves the words "shall adjudge" were not mandatory in that sense. But in my opinion in section 43 of the Provincial Insolvency Act we have a different provision. It is one thing to provide that on a certain thing happening or not happening the next step shall be such and such; it is quite another thing to provide that, if a certain order of the Court is not carried out within a certain time, a certain consequence shall follow. The latter provision is to my mind much more clearly mandatory than the former. It is very difficult to suggest any reasonable explanation why the words "shall be annulled" were used in section 43 of the Provincial Insolvency Act if something other than their plain meaning was intended, and it is not disputed that their plain meaning is mandatory. The learned Advocate-General has suggested that what the Legislature meant by using those words was "shall be liable to be annulled"; but he has not been able to suggest any satisfactory reason why, if so, the Legislature did not say what it meant. If anything less than a mandatory provision was intended, it would have been the simplest matter to express the real intention. I am very averse from accepting suggestions, which are not in-

frequently made in this Court when the plain language of a statute appears to lead in particular circumstances to inconvenient consequences, that the Legislature has done its work carelessly and inefficiently and has not said what it meant or has said what it did not mean. On the contrary we have no right to depart from the plain meaning of a statute except for some compelling reason, and our own view of what is convenient can seldom provide such a reason. In this instance the use of the words "shall be annulled" becomes more marked when we contrast it with the provision "may be annulled" in section 41 of the Presidency Towns Insolvency Act. It would be extravagant to assume that when framing section 43 of the Provincial Insolvency Act the Legislature had forgotten the wording of section 41 of the Presidency Towns Insolvency Act on the same subject, and if the latter provision had not been entirely forgotten, the words "shall be annulled" in section 43 of the Provincial Insolvency Act can hardly have been chosen otherwise than advisedly and deliberately. But the learned Advocate-General has suggested that, even if the Legislature used the words "shall be annulled" advisedly and deliberately, it would be possible for us to soften them by a kind of equitable interpretation, if experience showed that in certain circumstances they led to gross and uncontemplated hardship or to some unexpected conflict with the general purpose of the Act. In very exceptional cases it may be necessary for us to modify by interpretation even the most unambiguous words deliberately used by the Legislature in a particular passage of a statute if we are convinced that in the circumstances under consideration they lead to consequences wholly uncontemplated by the Legislature and repugnant to the purpose of the statute. The plainest words most deliberately chosen in a particular passage cannot be allowed to defeat the unquestionable intention of the Legislature in framing a statute. But that is only one aspect of the fundamental rule that we must enforce a statute "according to the intent of them that made it." Before we depart from the plain meaning of particular words deliberately chosen by the Legislature we must be very sure of our ground; we must be convinced that we have to deal with circumstances which the Legislature never foresaw and to which it never intended its words to apply, and of that we can hardly ever be convinced except by the clearest repugnancy to the purpose of the statute. It is true that our Insolvency Acts are intended not only for the relief of debtors but also for the fair treatment of their creditors and that, if the plain meaning of a particular passage, though deli-

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berately adopted, led to the infliction of gross and obviously uncontemplated hardship on a debtor or his creditors, which the Legislature could not have intended, we might be driven to depart from the language used in order to do what the Legislature clearly intended, not what it actually said. But can it be said that there is any such compelling reason to depart from the plain language in this case? The annulment of his adjudication can inflict no such hardship on a debtor, as section 10 (2) of the Provincial Insolvency Act indicates, that, if he has been prevented from making his application for discharge by some reasonable cause, the Court will permit him to present a new insolvency petition on the same facts as before. The hardship which the learned Advocate-General has pressed upon us is hardship to the creditors or some of them if the adjudication is annulled on account of the debtor's default when it is clearly profitable to them that the realisation and distribution of the debtor's assets should go on in the insolvency proceedings or disastrous to them that his property should again vest in the debtor. But it is to prevent any such hardship that the Legislature has by the terms of section 43 made the provisions of section 37 applicable in such a case. It is not necessary, when the adjudication is annulled because the debtor has failed to apply for his discharge within the specified time, that his property should revert to him; it may be vested by the Court in some other person. In a case such as the present one the obvious course is that the Court should order the property to vest in the Official Receiver. It has not been contended before us for the respondents that that would not be a proper order in this case or that, when the debtor's property has so vested in the Official Receiver, he would not be able to realise it by sale and suit and to distribute it rateably among the creditors. In my opinion the annulment of the adjudication in these cases was correct and must stand, as the District Judge had in these circumstances no discretion to refuse to make an order of annulment, but he should have made use of the provisions of S. 37 and should have ordered the debtor's property to vest in the Official Receiver, which order we should now make.

That order we can make in C.M.A. Nos. 310, 311 and 312 of 1925. But it will not serve the purpose of the appellant in C.M.A. No. 313 of 1925, another creditor, who objects to the dismissal of I A. No. 402 of 1922 on the file of the District Court. That was a petition by the Official Receiver originally under sections 53 and 54 of the Provincial Insolvency Act but apparently pressed only under section 54 for the annulment

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of a mortgage of almost the whole property of the debtors concerned as made with a view of giving the mortgagees a preference over their other creditors and was dismissed by the District Judge as having abated when the adjudication was annulled. It is contended by Mr. Srinivasa Aiyangar, who has argued the case for respondents 2 and 3 in this appeal, that, even if a debtor's property is ordered to vest in the Official Receiver under section 37 of the Provincial Insolvency Act, proceedings under section 54 cannot go on after the adjudication has been annulled. He first argues that under the wording of section 54 such a petition can only proceed while the debtor continues to be an adjudged insolvent, which he is no longer when the adjudication has been annulled. But that is not to be found explicitly or implicitly in the section. It is true that, unless the debtor is once adjudged an insolvent, the Receiver cannot move under the section. But apart from that essential the words "if such person is adjudged insolvent on a petition" are of grammatical effect in the section only to fix the identity of the petition from the date of which the period has to be calculated within which a transfer, etc., made comes within the scope of the section. There are no words in the section to express or imply that the petition, once properly preferred, can be prosecuted only while the adjudication is in force. And there is nothing incongruous in a Receiver, if the property of a debtor has vested in him under section 37 for realisation and distribution, continuing to prosecute a petition under section 54. It is the duty of the Receiver in such circumstances, as before the annulment of the adjudication, to distribute the property rateably. A petition under section 54 is only an incidental proceeding by which the Receiver ensures a fair distribution by making the creditor to whom preference has been given disgorge what he has got in excess of his fair share. Such a creditor is not prevented from getting his fair share with the other creditors; in effect it is only the excess which he must give up. But the objection of substance raised by Mr. Srinivasa Aiyangar is that the jurisdiction to annul the preferential transaction and to make the preferred creditor disgorge is peculiar to insolvency proceedings and it is only in the course of those proceedings that it can be exercised That proposition is sound so far as it goes. Outside its insolvency jurisdiction the Court has no power to annul a preferential transaction merely because it gives preference to one creditor over others. But Mr. Srinivasa Aiyangar goes on to contend that immediately an adjudication is annulled the insolvency proceedings come to an

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end. As a general proposition that is not so. Certainly it cannot be suggested that in this country annulment of adjudication puts the clock back as if the adjudication had never been. The opening part of section 37 of the Provincial Insolvency Act, which validates what has been done while the adjudication has been in force, is enough to dispose of any such suggestion. But apart from that I think it is clear that the insolvency proceedings do not always stop at the moment of annulment. Sections 39 and 40 show that insolvency proceedings continue after adjudication has been annulled on a composition or scheme being approved, so much so that on the debtor's failure to pay any instalment due in pursuance of the composition or scheme the Court can readjudge him insolvent without any fresh insolvency petition being put in, which it could not do if the insolvency proceedings were at an end. That the insolvency proceedings continue in such a case was decided recently in *Timmappa* v. *Devasi Harpal*.[14] And see *Ex parte Lennard. Re Chidley*.[13] It is true that in the former case Wallace, J., said that an annulment of adjudication under section 43 is evidently intended to put an end to the insolvency proceedings as a whole. But that statement was *obiter dictum* It was not necessary for that case, and the question was not before him, and with great respect I doubt whether he considered fully all the consequences of his proposition. Mr. Srinivasa Aiyangar urges that we must infer from the fact that after an annulment of adjudication under section 43 a debtor, as indicated by section 10 (2), is able in certain circumstances to present a fresh insolvency petition on the same facts as before that the previous insolvency proceedings came to a complete end when his adjudication was annulled. No doubt all such advantages as he got by adjudication then came to an end; but that does not necessarily imply that the whole insolvency proceedings came to an end. And, when once we reach the conclusion that under section 37 the Court may order the property of the debtor to vest in a Receiver for the purpose of realisation and distribution among his creditors—and that is admitted by Mr. Srinivasa Aiyangar—it is only by going out of our way that we can suppose that the Receiver, who has been appointed by the Court in the exercise of its insolvency jurisdiction, is to be controlled and directed by the Court, as he must be controlled and directed in the exercise of some other jurisdiction. In a large proportion of the cases in which an adjudication is annulled otherwise than under section 35 or section 36 there will be further proceedings to be

13 (1875) 45 L J (Bk) 49

14 (1929) M.W N 22

taken or superintended by the Court, and that must be done in the exercise of its insolvency jurisdiction. The Act does not say that insolvency proceedings cease in all cases with the annulment of adjudication, and sections 37, 39, 40 and 50 show that proceedings may continue which must be proceedings before the Court in its insolvency jurisdiction. In my opinion, if the Court orders under section 37 that the property of the debtor shall vest in a Receiver, the insolvency proceedings will continue while the Receiver's work goes on. That being so, there is no difficulty in the Receiver continuing to prosecute in those circumstances a petition under section 54 after the adjudication has been annulled under section 43. Moreover, if, as in this case, the Receiver has initiated the proceedings under section 54 before the adjudication is annulled, the position is still simpler Section 37 validates acts done by him after the adjudication is made and before it is annulled. Even if we do not go so far as to say that the presentation of any petition to the Court in his capacity as Receiver is an "act" within the meaning of section 37, the presentation of a petition under section 54 must, I think, as the learned Advocate-General contends, be such an act. By presenting a petition under section 54 the Receiver exercises his option to treat the transaction concerned as void. The formal exercise of that option is an act within his competence. If, as can hardly be denied, the institution of a suit in the interest of the debtor's estate by the Receiver after the adjudication is made and before it is annulled is an act which will remain valid under section 37 after the adjudication is annulled for the benefit of the debtor or any one else concerned, the formal exercise of his option to void a transfer must surely be an act which under section 37 will remain valid. If it remains valid after the annulment of the adjudication, then it is unreasonable to suppose that the Receiver cannot continue to pursue the remedy provided by section 54. I agree, therefore, that C.M.A No. 313 of 1925 must be allowed and the dismissal of I.A. No. 402 of 1922 must be set aside and that petition must be remanded to the District Judge for fresh disposal. I agree also that C.R.Ps. Nos. 627 and 628 of 1924, 173 and 174 of 1925 against the District Judge's refusal to review his order annulling the adjudication should be dismissed as unnecessary and that in those revision petitions and in the four appeals each party should bear his own costs.

Mr. Srinivasa Aiyangar's contention that his client, an auction-purchaser in execution, is protected by section 54 (2) of the Provincial Insolvency Act as a purchaser in good faith for

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valuable consideration is clearly one which should be urged before the District Judge when I.A. No. 402 of 1922 is reheard.

A.S.V. *Orders set aside: Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD SHAW, LORD CARSON, LORD ATKIN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Prafulla Nath Tagore and others .. *Appellants**

v.

Satya Bhusan Das and others .. *Respondents.*

P. C.

Prafulla Nath Tagore v. Satya Bhusan Das.

Bengal Tenancy Act, Ss. 159 to 177—Sub-tenure holders—Protection afforded to—Lumping together of several tenures in one order for sale—Legality of—Separate holdings of one holder—Simple suit by Zamindar in respect of—Maintainability—Separate sales of holdings in—Decree in suit if may provide for—Proceedings for separate sales not taken by Zamindar—Division of, into separate tenures—What amounts to—Evidence of—Validity of—Consent of landlord in writing—Necessity—Law before and since Regulations of 1799.

The provisions of Ss 159 to 177 of the Act are devised for the purpose of protecting the persons interested in each tenure put up for sale. A sub-tenure holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the object of the Act if several tenures could be lumped together in one order for sale so that a sub-tenure holder to get protection would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connection.

To defeat the claim of a sub-tenure holder the Zamindar auction purchaser must show that his proceedings were taken in respect of separate tenures and gave the sub-tenure holders the protection to which they are entitled under the Act as stated above.

Under the Civil Procedure Code the Zamindar may join in one suit claims against a holder in respect of all his separate holdings Such a suit can result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure There is nothing in the Civil Procedure Code or in the Bengal Tenancy Act to prevent the orders and decrees in such a suit from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately, so that each may be redeemed separately by the incumbrances of each separate part pursuant to section 170 of the Act.

Held that, in the case before their Lordships, though the Zamindar had joined in one suit a claim in respect of several tenures, the proceedings taken by him were ineffective to annul the eleven incumbrances of which the plaintiff was then the holder.

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*P.C. Appeals Nos. 132 and 133 of 1924. 19th March, 1929.

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Before 1799 the consent of the landlord in writing was not necessary to a division of a tenure into separate tenures as between the Zamindar and the tenant Since the Bengal Regulations of 1799 such division can only validly take place with the consent of the superior landlord in writing.

Whether a tenure has been divided or not is a question mainly of fact in each case In view of the prevailing joint ownership of property by both landlord and tenant, and the prevailing system of partition, it is obvious that either party may accept the partition made by the others without necessarily intending to alter their legal relations *inter se* Thus the separate shareholders in the landlord family may collect a separate share of the rent without either party intending to divide the tenure: and similarly the landlord may collect separate shares of the rent from separate shareholders in the tenant family without the legal position being altered. The question whether a sub-division has been made is really the question whether the parties have come to a fresh agreement, and must be determined by the familiar considerations which attach to such a problem

Consolidated Cross-Appeals Nos. 132 of 133 of 1924 from two decrees of the High Court, dated 18th July, 1923, varying decrees of the Subordinate Judge of Backergunj, dated 22nd December, 1919.

Dunne, K.C. and *E. B. Raikes* for appellants.

De Gruyther, K.C. and *H. N. Sen* for respondents.

19th March, 1929. The judgment of their Lordships was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from the High Court at Fort William in Bengal in a suit brought by the plaintiff to establish his right to certain under-tenures of land in the village of Dashmina against the Zamindar of Nasirpur in whose Zemindari the village lies.

The rights of the parties involve an examination of the creation of tenures and sub-tenures from before 1799 and of the complicated devolution of title in the respective holders since that date. It is also necessary to consider the provisions of the Bengal Tenancy Act, 1885, relating to the power of an auction purchaser to annul incumbrances, powers which the Zamindar says that he has exercised so as to defeat any claim by the plaintiff.

Their Lordships have the assistance of careful and accurate judgments in the Courts below in which the facts are fully surveyed, and it will be sufficient for the purpose of presenting the issues that arise before the Board to state shortly the principal landmarks in the history of the title. Before 1799 the defendants' predecessor, the then Zamindar of Nasirpur, had created a *jumba* tenure, which included the village in question. known as the Taluk Shib Deb Sen. By the time of the permanent settlement the Sen family held the property in five

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branches in five equal shares of three annas, four gundas each, and one-fifth of the rent was paid separately by each shareholder. Other sub-divisions of the shares followed which it is unnecessary here to specify. Before 1835 the Zamindar had reacquired a 4 anna share in the whole tenure. In 1852 the Zamindar created in favour of two persons Kader and Saker a *putni* tenure superior to the *jumba* tenure over the whole property and put them into possession of the 4 anna share They thus held the 4 anna share in possession and were superior landlords under the Zamindar of the remaining 12 anna share still outstanding in the Sen family. In 1861 Kader and Saker the *putnidars* enforced their right to rent against the holders of the 12 anna share, put the property up to sale and bought it, thus acquiring the interest in the whole In 1862, however, the Zamindar on his part enforcing his right to rent against Kader and Saker, put the whole *putni* tenure up to sale, and bought it. The 4 anna share thus reverted to him in possession, the 12 anna share of the *jumba* tenure being still outstanding. In 1871 the Zamindar leased by *pottah* the 4 anna share to Kader and Saker Meantime in natural course numerous sub-tenures had been created. In 1892 the son and successor of Kader granted to the father of the plaintiff a mortgage of 11 such sub-tenures in the 12 anna share In 1901 the plaintiff's father obtained a mortgage decree against the mortgagor, and in 1905, under the decree the plaintiff, his father's successor in title, had the sub-tenures sold and purchased them. Having thus established the plaintiff as the owner of 11 sub-tenures we now return to the main title. In 1905 the Zamindar sued Kader and Saker for arrears of rent, both on the 12 anna share under the *jumba taluk,* and on the 4 anna share under the *pottah taluk.* He obtained decrees, had the property put up for sale in 1906 and himself purchased. He gave notices to annul incumbrances in pursuance of the powers given by the Bengal Tenancy Act. He, therefore, claims now to hold the whole property free of all sub-tenures, and if he is right he has succeeded in eliminating the plaintiff and his 11 sub-tenures. The plaintiff, on the other hand, claims that not only his 11 sub-tenures are still in existence, but also further sub-tenures which he acquired after the Zamindar's purchase in 1906. For in 1908 the plaintiff sued for the balance of the before-mentioned mortgage; and obtained a personal decree against the mortgagor. In execution of that decree he procured the sale of certain other sub-tenures as the property of the judgment-debtor, and bought them in 1910 and 1912.

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The Subordinate Judge found in favour of the plaintiff substantially on the whole of his claim. The High Court found in favour of the plaintiff in respect of the 11 sub-tenures bought in 1905; but decided against him in respect of the sub-tenures bought in 1908 and 1910 except in respect of 2 or 3 in which it was held that the plaintiff could rely on the rights of superior sub-tenure holders to him acquired before the Zamindar's purchase in 1906. We are thus brought to the issues before the Board.

The plaintiff contends that before 1905 the original *jumba* tenure Shib Deb Sen had been divided into separate tenures with the consent of the Zamindar. The Zamindar, however, as is contended, in his suits in 1905 sued as for one single tenure and obtained annulment of incumbrances as though the sub-tenures were under one single tenure. In this way the sub-tenure holders lost the right to redeem the separate divided tenure under which they held and were exposed to the much heavier liability of redeeming the whole. This, it is said, is contrary to the provisions of the Bengal Tenancy Act. The Zamindar, on the other hand, says that the original tenure never was divided. If this is so, there is no ground for complaint; the plaintiff fails. The Zamindar further contends that even if the tenure had been divided his proceedings were in order, and the sub-tenure holders could have exercised their rights under the Bengal Tenancy Act to redeem the separate divided tenures. The Courts below have decided against the Zamindar on both his contentions.

The first question, therefore, is whether the original *jumba* tenure was ever divided into separate tenures as between the Zamindar and the tenant. As to this it has to be remembered that by the course of legislation ever since the Bengal Regulations of 1799 such division can only validly take place with the consent of the superior landlord in writing. Whether a tenure has been divided or not is a question mainly of fact in each case. In view of the prevailing joint ownership of property by both landlord and tenant, and the prevailing system of partition, it is obvious that either party may accept the partition made by the others without necessarily intending to alter their legal relations *inter se*. Thus the separate shareholders in the landlord family may collect a separate share of the rent without either party intending to divide the tenure: and similarly the landlord may collect separate shares of the rent from separate shareholders in the tenant family without the legal position being altered. The question whether a sub-division has been made is really the ques-

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tion whether the parties have come to a fresh agreement, and must be determined by the familiar considerations which attach to such a problem. In the present case a series of facts extending over a century were laid before the Court, some pointing in one direction, some in the other. The effect of the evidence is thus summarised by the learned Subordinate Judge in a passage adopted by the High Court:

> "Thus we find that rents for the several interests were separately realised both amicably and by suits for over a century, that separate rent receipts were granted for the separate parts, that the several interests were treated all along except indirectly in the last suit No. 48, as specific tenures in the names of the respective holders with specific *sadar jumma* or annual liabilities for rent and that for purposes of mowzahwar returns, cess returns execution of degrees record of rights and transfers they were also treated as separate tenures. We have also the fact that the lands of the respective tenures are not entirely joint, and that there are several under-tenures, including some owned by the Tagores themselves which are exclusively held under one or other of the said interests"

Their Lordships are of opinion that there is evidence to support these findings and they see no reason to doubt that in substance they are correct, and that they justify the view expressed in both Courts that the original tenure had been at a very early time divided into separate tenures. At what time, it appears to their Lordships unnecessary to determine. If before 1799 the consent of the landlord in writing was unnecessary: if after 1799 there is ample evidence to support the finding of the Subordinate Judge that there was a written consent. The finding, therefore, of the High Court affirming the finding of the Subordinate Judge on this matter must stand. In coming to this conclusion their Lordships must not be thought to express assent to the view taken in the High Court at to the admissibility of the judgment of Mr. Kemp, the District Judge in 1859, in a suit between Kader and Saker, the then *putnidars* against a sub-tenure holder on the ground that it tended to show the probability of a statement made by a witness called at the trial. It is sufficient to indicate their Lordships' opinion that this reasoning is at least open to doubt, for the judgment in question is only a small feature of the evidence and does not appear materially to have affected the findings for which there is ample other support.

On the footing therefore that there were in existence several tenures in place of the original single tenure the question arises whether the Zamindar took appropriate steps to annul the sub-tenures This depends upon the construction of Chapter XIV of the Bengal Tenancy Act, 1885, entitled "Sale for Arrears under Decree" and comprising Ss. 159-177 inclusive

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of the Act. Summarising the sections the chapter provides in S. 162 that "when a decree has been passed for an arrear of rent due for a tenure or holding" the decree-holder may apply for sale producing a statement showing the village in which the land comprised in the tenure or holding is situate and the yearly rent payable from the same: the land may then be proclaimed and attached: S. 163; the tenure or holding shall first be put up to auction subject to incumbrances which by S. 161 include sub-tenures; and if the bidding does not reach a sum equivalent to the amount of the decree and costs then at the request of the decree-holder the land shall be put up for sale with power to the purchaser to avoid incumbrances: S 165. The purchaser at such a sale may within a year from the sale avoid incumbrances by presenting an application to the collector requesting him to serve on the incumbrancer a notice of annulment: and from the date of such service the incumbrance is annulled: S. 167. By the provisions of S 170, when an order for a sale of a tenure or holding in execution of a decree for arrears due thereon has been made, the tenure shall not be released from attachment unless before it is knocked down to the auction purchaser the amount of the decree and costs is paid into Court: and any person having in the tenure any interest voidable on the sale may pay money into Court.

It seems to their Lordships clear that the provisions of the Act are devised for the purpose of protecting the persons interested in each separate tenure put up for sale A sub-tenure holder may have to pay the arrears due upon the whole tenure under which he holds, but no more; and it would defeat the objects of the Act if several tenures could be lumped together in one order for sale so that a sub-tenure holder to get protection would have to pay the arrears not only on the specific tenure under which he held, but on other tenures with which he had no connection. This construction of the Act has been adopted in numerous decisions of the Courts in India and their Lordships consider it to be correct. It follows that the defendant must fail in resisting the plaintiff's claim unless he can show that his proceedings were taken in respect of separate tenures and gave the sub-tenure holders the protection to which their Lordships have already held they were entitled.

There can be no doubt that the Code of Civil Procedure permits a plaintiff to join in one suit claims against a defendant in respect of more than one tenure. It appears to have been the view of the High Court following other decisions in India

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to the like effect that such a suit can never result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure. Their Lordships are inclined to think that this goes too far. If the original suit can be brought against a holder in respect of all his separate holdings, there appears to be nothing in the Code of Civil Procedure or in the Bengal Tenancy Act to prevent the consequent decrees and orders from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought. It would be a misfortune to find a system of procedure so rigid as to lead to an illogical and inconvenient result: and their Lordships are not prepared to hold that this defect exists. But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately, so that each may be redeemed separately by the incumbrancers of such separate part pursuant to S. 170. In the present case while there is sufficient in the Zamindar's plaints in 1905 to support a claim in respect of several tenures their Lordships have not been provided with the documents which record the subsequent proceedings for sale and annulment so as to enable them to conclude that the subsequent proceedings maintained the distribution into several tenures. Such documents as are before them rather lead to the opposite conclusion.

Their Lordships are therefore unable to disagree with the view of the Courts below that the proceedings taken by the Zamindar in 1905 and the following years were ineffective to annul the 11 incumbrances of which the plaintiff was then the holder. As to the sub-tenures acquired by the plaintiff after the Zamindar had recourse to his rights their Lordships are in agreement with the reasons given by the High Court on review for holding that the plaintiff cannot now make a claim to these, and they confirm the decision given against the plaintiff on this point. They also see no reason to differ from the conclusion of the High Court in respect of the (two) tenures excepted in favour of the plaintiff. For these reasons their Lordships are of opinion that the appeal and cross-appeal should be dismissed with costs, and they will humbly advise his Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent: *W. W. Box & Co.*

K.J.R. *Appeal and Cross-appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD CHANCELLOR, LORD CARSON AND SIR CHARLES SARGANT.

Vallabhdas Naranji, Khot of Kanjur .. *Appellant**

v.

The Development Officer, Bandra .. *Respondent.*

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Land Acquisition Act (I of 1894), S 23—Compensation—Assessment of—Buildings erected by Government on land acquired prior to notification under S 6 of Act, while in possession thereof—Compensation to owner of land in case of—Basis proper of—Inclusion of value of buildings erected by Government—Owner's right to insist on—Maxim—"Quidquid plantatur solo solo cedit"*—English Law as comprised in—Inapplicability in India—Buildings erected by one person on land of another—Rights of person building in case of—Building by person in possession of land as mere trespasser—Building by person in possession under* bona fide *claim of right—Distinction—Valuation—Questions as to—Privy Council's interference in case of—Conditions*

Land, which was in the occupation and the property of the appellant, was, along with other land, acquired by the Government under the Land Acquisition Act, 1894, by a notification under S 6 of that Act, which was served only on 4th November, 1920 The Government, however, managed to take possession of the lands so acquired some time previously and erected buildings thereon On a reference made under S 18 of the Act, the Courts below refused to allow the value of the building erected by the Government upon the appellant's land to be considered in assessing the amount of compensation to be paid to the appellant, held that he was only entitled to compensation for the occupation of the land by the Government before the notification of 4th November, 1920, and awarded such compensation in the form of interest on the value of the land computed from the date when the Government took possession

Held, affirming the Courts below, that, as the Government were in a position by law at any moment to regularise their position by a notification under S. 6 of the Act, they must be considered to have been in possession, prior to that notification, "not as mere trespassers" but under such a colour of title that the buildings erected by them on the land ought not to be included in the valuation as having become the property of the landowner, and that the justice of the case was met by holding that the appellant was entitled to compensation for the occupation of the lands by the Government before the notification of 4th November, 1920

The English Law as comprised in the maxim, "*Quidquid plantatur solo solo cedit,*" has no application in India.

There is no absolute rule of law in India that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself As a general rule, a person who is in possession of the land of another under any *bona fide* title or claim of title, and who erects buildings or makes other such improvements thereon, is entitled either to remove the structure or the materials or to be paid the value thereof by the owner.

Quaere: Whether the same right is available to a person who was in possession as a mere trespasser when he erected the building or made other such improvement.

In an appeal against the reduction by the High Court of the amount allowed by the District Judge as compensation for land acquired under

*P.C Appeal No. 119 of 1927. 16th April, 1929.

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the Land Acquisition Act, 1894, *held*, that, as the questions involved were ones of valuation and not of principle, the Privy Council must, in accordance with the usual practice of the Board, decline to speculate as to the proper amount to be awarded under such circumstances

Appeal No. 119 of 1927 from a decree made on the 24th February, 1926 by the High Court, Bombay (Macleod, C.J. and Coyajee, J.) varying an award made on the 28th July, 1924 by the Assistant Judge of Thana, on a reference made under S. 18 of the Land Acquisition Act, 1894.

The material facts of the case appear sufficiently from their Lordships' judgment

Upjohn, K.C. and *Raikes* for appellant.

Lowndes, K.C. and *Brown* for respondent.

Upjohn, K.C., referred to the Land Acquisition Act, S. 3 (definition of "land"), and section 23 (as to market value).

As to the principle on which compensation is assessed when land is taken under compulsory powers, see *In re Lucas and Chesterfield Gas and Water Board.*[1]

On the crucial date, *i.e.*, when the Government issued its declaration to acquire the land, the appellant was the owner of the buildings erected on the land. The Government had no right to take possession until the award was made by the Collector: section 16 of the Act. In section 34 provision is made for payment of interest.

Lowndes, K.C. for respondent—An issue was raised whether the appellant was entitled to extra compensation by reason of Government having taken possession prior to the Notification, and the Courts awarded him compensation from that date in the shape of interest

Under section 23 of the Act the Court awards compensation, not market value, though market value is one of the factors to be taken into consideration. The whole scheme of the Act is that compensation is awarded (*vide* the Preamble and the various sections of the Act which refer to compensation and compensation alone, and not to market value).

In addition to the cases cited at the Bar and referred to in their Lordships' judgment, the following decision was also mentioned during the course of the argument:—*Frenchman* v. *Assistant Collector, Haveli.*[2]

16th April, 1929. Their Lordships' judgment was delivered by

Lord Carson.

LORD CARSON.—This is an appeal against a decree made on the 24th February, 1926, by the High Court of Judicature

1. (1909) 1 K.B. 16. 2. (1922) 24 Bom. L.R. 782.

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at Bombay, varying an award, dated the 28th July, 1924, by the Assistant Judge at Thana, on a reference made under section 18 of the Land Acquisition Act, 1894.

The land in question is part of the village of Kanjur, and the area in dispute in this appeal is stated to be about 26¾ acres. Some of the lands were in the possession of *sutidars* who had rights of permanent occupancy in their rice fields. The first question which was argued before this Board on the present appeal was the claim of the appellants that certain buildings which had been erected by the Government on the land at the date of the Government's declaration of the 4th November, 1920, under the sixth section of the Land Acquisition Act had become and were the appellant's property, and that he should be allowed the value of the land in the state in which it then was; that is to say, with the buildings on it. The way that question has arisen is as follows:—

It appears that in 1919 the Government resolved to acquire the land in question and other land under the said Act, and by arrangement with certain of the *sutidars* they took possession of the land, including a portion which was in the occupation and the property of the appellant. Upon the land, including a portion in the possession of the appellant, they proceeded to erect certain buildings without the necessary notification, which was not served until the 4th November, 1920, when the Government notified, under the Land Acquisition Act, section 6, a declaration that 52 acres more particularly described therein, situated in the said village and including the land in question in this appeal, were needed for a public purpose, and the Collector took order for the acquisition thereof. It is to be observed that the Government were in a position by law at any moment to regularise their position by such a notification—a fact which becomes material when it has to be considered what the nature of their trespass was under the law as applicable on the question of the right of the appellants to have the buildings which were erected on the lands before the 4th November included in the valuation.

The Assistant Judge held that the appellant was not entitled to have the said buildings erected by the Government included in the valuation, but that he was entitled to compensation for the occupation of the land by the officials before the notification of the 4th November, 1920, and he awarded such compensation in the form of interest on the value of the land computed from the date when the Government took possession

On appeal to the High Court of Appeal at Bombay that Court confirmed on this point the judgment of the Assistant

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Judge and refused to allow the value of the building to be considered in assessing the amount of compensation to be paid to the appellant. In the course of his judgment the learned Chief Justice said:

"It is curious to have to remark that Government entered upon this area before the land was actually notified for acquisition They seem to have done so in the belief that they could get the consent of the occupants to such possession. They not only took possession, but erected buildings on the land."

The learned Chief Justice, however, held that the question was decided by the principles laid down in *Premji Jivan Bhate* v. *Cassum Juma Ahmed*[3] and he quoted from the judgment of Sargent, C.J., in that case as follows:

"It is well-established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building"

Now up to a certain point there was no difference between counsel for the parties as to the law applicable to the case. It was agreed on both sides that the English Law as comprised in the maxim "*Quidquid plantatur solo solo cedit*" has no application. In 1866, in consequence of a difference of opinion between certain divisions of the Courts, the law was carefully reviewed in a case referred to a Full Bench, *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee*.[4] In the order of reference it is stated that the question involved was "whether a person who, being in possession of land as proprietor, erects *pukka* buildings (of brick, etc.) thereon, has a right, on being subsequently ejected from the land as having no title, to pull down those buildings and remove the materials. In the present case, we decided that he has no such right. Since we so decided, it appears that another Division Bench have, in the case of *Gobind Poramanick* v. *Gooroo Churn Dutt*,[5] decided to the contrary effect."

The judgment was given by Barnes Peacock, C.J., who stated as follows:

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

Later on he adds:

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by

3 (1895) I.L.R. 20 B. 298 4. (1866) 6 S.W.R. 228

5. (1865) 3 S.W.R. 71.

the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil,—the option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.''

The question is, what is meant by a "mere trespasser" as contradistinguished from possession under "any *bona fide* title or claim of title." In the case quoted the defendant had erected buildings on land sold to his predecessors-in-title by a widow during the lifetime of the widow, but which sale was held void as being improperly made by the widow, and it is to be noted that the case reported in *Gobind Poramanick* v. *Goordo Churn Dutt*[5] and referred to in the reference, was in no way overruled. It is therefore worth while to consider the view taken by the learned Judges in that case, who stated the law as follows:

''But, in the present case, we have a trespasser who has tortiously entered upon the land of another and built a house thereon Without going so far as to say under no circumstances could acquiescence by the party injured in the act of the injury done, be inferred, we are clearly of opinion that no such acquiescence was either pleaded or proved in the present case. We, therefore, think the plaintiff is clearly entitled as against the defendant, a trespasser, to possession of his land, leaving the defendant at liberty to remove the bricks of his house.''

Again in *Narayan bin Raghoji* v. *Bholagir Guru Mangir*,[6] where H., knowing that B. claimed certain land as his own, nevertheless purchased the land from a third person and erected a bungalow thereon, which B. did not interfere to prevent. Couch, C.J., in giving judgment, said:

''H. took the risk, and as he was informed of B.'s claim it was not necessary for the latter to give a notice We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, *viz.*, that they should belong to the owner of the land The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials ''

In the recent case before this Board, *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury*,[7] the statement first quoted from the judgment of Sir Barnes Peacock was cited with approval, and it was added that such statement "seems to have been accepted for many years as a correct pronouncement".

It was contended, however, on behalf of the appellant that in the various cases relied upon there was at least some genuine

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5 (1865) 3 S.W.R. 71 6 (1869) 6 Bom H C R (A C J) 80
7. (1927) L.R. 54 I.A 218: I.L.R. 54 C. 669: 53 M.L.J. 158 (P.C.).

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claim or belief in the party erecting the buildings that he had a title to do so, even though he was eventually held to be a trespasser; and it was urged that no such claim or belief existed in the present case, in which it was said the Government, without any pretence of right, tortiously invaded the appellant's property and proceeded to deal with it as their own. The learned counsel for the respondent, whilst contending that such was not the true state of facts, and that the Government officials could not be considered mere trespassers, was prepared to argue that, even if it were so, once it was admitted that the English maxim did not apply, the logical consequence followed that in any case of trespass by building on the lands of another, the trespasser had a right to remove the structure or be paid the value thereof by the owner, and he relied upon the fact that no case drawing a distinction in the nature or degree of the trespass could be found. Their Lordships, however, do not think it necessary to give a decision upon this far-reaching contention. They agree with what was apparently the view of both Courts in India that under the circumstances of this case, as already set forth, by the law of India, which they appear to have correctly interpreted, the Government officials were in possession "not as mere trespassers" but under such a colour of title that the buildings erected by them on the land ought not to be included in the valuation as having become the property of the landowner. They considered, and their Lordships agree, that the justice of the case was met by holding that the appellant was entitled to compensation for the occupation of the lands by the officials before the notification of the 4th November, 1920, which, as before stated, was awarded in the form of interest on the value of the land computed from the 27th November, 1919, the date when the Government took possession. This method of compensation has not been questioned by the respondent.

The case of *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Company*[8] was referred to in the course of the argument to support a claim that at all events the appellants had at the crucial date a right to call upon the respondents to remove the buildings, and that they were entitled to be paid for their land with such a right attaching to it. Whether that case applies or whether such a right would be of any value, their Lordships do not think it necessary to decide, as it is admitted that no such claim was put forward before either of the Courts in India. Their Lordships must hold, therefore, that the Courts

8. (1900) L.R. 28 I.A. 121: I.L.R. 26 B. 1 (P.C.).

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below were right in disallowing the claim of the appellants in respect of buildings. and on this point the appeal fails.

The appellant has also appealed against so much of the judgment of the High Court as reduced the value placed upon the land by the District Judge. The main contentions were (1) that as the land had admittedly potentialities as building land the High Court had not the evidence before it to reduce the estimate made by the District Judge, and in fact ignored the evidence upon this point, and (2) that the District Judge, when he dealt with the transaction relating to a plot of the land (Survey No. 170) containing 16,000 square yards, and sold in the month of April, 1920, at 8 annas per square yard, was right in accepting this transaction as a reasonable guide to the value of all the land in question, on the ground that this plot was not so favourably situate as the bulk of the land. The High Court has very fully dealt with these considerations and given their reasons for not being able to accept the conclusions at which the District Judge had arrived.

Their Lordships are unable to find any principle involved which could lead them to say that the High Court were wrong in arriving at the decision to which they have come, and as the questions involved are ones of valuation and not of principle, their Lordships, in accordance with the usual practice of this Board, must decline to speculate as to the proper amount to be awarded under such circumstances.

The appeal upon this point accordingly fails.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Ranken Ford & Chester.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE ODGERS AND MR. JUSTICE BEASLEY.

The Official Assignee of Madras .. *Appellant**

v.

E. Narasimha Mudaliar, Proprietor of James & Co., Periamet, Madras .. *Respondent.*

F. B.

The Official Assignee of Madras v. Narasimha Mudaliar.

Presidency Towns Insolvency Act (III of 1909), Ss. 7 and 36 (as amended by Act XI of 1927)—Person alleged to be indebted to the insolvent

*O.S.A. No. 26 of 1928. 12th March, 1929.

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The Official Assignee of Madras v. Narasimha Mudaliar.

—Examination as a witness—Indebtedness disputed—Jurisdiction of Insolvency Court to order payment of the amount—Money claim against a stranger to the insolvency—Application by Official Assignee under S 7—Discretion of Insolvency Court to decide or leave it for a separate suit

Where the Official Assignee summons a person alleged to be indebted to the insolvent estate as a witness under S 36 of the Presidency Towns Insolvency Act and that witness disputes his indebtedness to the insolvent, the Insolvency Court has no jurisdiction to make an order for payment of the amount by him and the Official Assignee must only proceed by way of suit to recover the amount

Obiter: The Official Assignee is entitled to proceed by way of motion under S 7 of the Presidency Towns Insolvency Act in those cases where he has a money claim against a stranger to the insolvency. It is then for the Insolvency Court to say whether the matter is one which it is reasonable, having regard to the convenience of all concerned, to deal with on a motion or whether it should be dealt with in a regular suit

Jnanendra Bala Debi v *The Official Assignee of Calcutta*, (1925) I.L R 54 Cal 251 referred to.

On appeal from the order of the Hon'ble Mr. Justice Waller, dated 13th February, 1928 and passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in Petition No. 193 of 1926

Nugent Grant instructed by *V. Varadaraja Mudaliar* for appellant.

R. N Aingar for respondent.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *The Chief Justice.*—I have had the advantage in this case of perusing the judgment about to be delivered by Beasley, J. It sums up the results arrived at after a long discussion between him, Odgers and myself and it may be taken to be the judgment of the Court. I only add a few words because I feel it is incumbent upon me to do so as for eight years I was in charge of the Insolvency Jurisdiction of the Original Side of the High Court. The procedure which was prohibited by the judgment of the Calcutta High Court in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*[1] was that persons alleged to be indebted to the Bankrupt estate—known in our Court for some reason, I never quite understood, as "garnishees"—should be examined, which of course in effect means cross-examined, by the Official Assignee under the powers of section 36 and that statements made by them not amounting to a definite admission of indebtedness to the estate should be used under section 7 to ask the Court then and there to pass a decree against the garnishees on the ground that though they are not

1. (1925) I.L.R. 54 C. 251.

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:antamount to direct admissions they were available as evidence o show that their answer to the claim put forward by the Offi- :ial Assignee was untrue. That procedure, in my opinion, was ıot only rightly denounced by the Calcutta High Court but is lefinitely prohibited by the Statute as amended. That is suffi- :ient to uphold the judgment of Waller, J., and to dismiss this ıppeal.

But a much wider question was argued and I think it would)e wrong for us not to express our opinion upon it. It was said)n the authority of the English cases cited by my learned brother :hat, where a debt was not admitted, being a debt as to which he Official Assignee stood in no higher position by reason of he special provisions of the Bankruptcy Law than the debtor iimself, the matter could not be tried within the jurisdiction of the Insolvency Court. That that is the law in England I lo not question. I do not think it is, or was intended to be, he law in India under the Presidency Towns Insolvency Act. :t is obvious that the Indian Statute aims at relieving the Offi- :ial Assignee in charge of a Bankrupt estate in suitable cases from incurring the heavy burdens of institution fees which vould necessarily be incurred if he were compelled in all cases o have recourse to ordinary suits. *See* section 115 of the Act. am quite content to leave it as a matter of discretion to the earned Judge as to whether in any given case he should deal vith such a claim in the Insolvency Court here or refer it to the machinery of an ordinary suit. It must be remembered :hat the Court-fees of an ordinary suit in England are very small md that no inconvenience is caused and no obstruction is put in :he way of the Bankrupt estate by confining the jurisdiction of :he Bankruptcy Court to claims where the title of the trustee of :he Bankrupt estate stands on a higher footing than would have)een the case if the debtor had been suing himself. In India it is quite a different matter and in many cases it would be quite impossible to obtain a sum out of such estate as is actually in the hands of the Official Assignee sufficient to institute pro- ceedings for the recovery of outstanding debts though the Offi- cial Assignee's claim may be a perfectly good one. I am quite content that it should be left to the Judge in insolvency to decide on the balance of convenience whether it is best to try such cases himself, or to relegate their disposal to the ordi- nary courts; and that is a discretion which, when exercised by him, an Appellate Court would interfere with only on grounds which are well known and must necessarily be of rare occur-

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rence. It is quite easy for the Judge who tries the summons to insist upon the Official Assignee giving to the other side what is in effect a pleading, giving detailed particulars of the nature of his claim and to give full discovery of documents if that is sought for. On the other hand there may be cases where the person sought to be made liable to the estate lives at a great distance, or where the estate has ample funds for payment of the necessary institution fees in which it would be just and right for the learned Judge in insolvency to decline to deal with the matter here in Madras. In this case Mr. Waller, J., has exercised his discretion that this was a case which was properly triable by the ordinary courts; and with that exercise of discretion I decline to interfere.

I may add in conclusion that, now that our attention has been drawn to it, I think the present form of what is called a garnishee summons is capable of being construed as throwing the burden of proof not on the Official Assignee but on the so-called garnishee. In my experience, the Official Assignee never sought to take that attitude and always proceeded to prove his case as if he were a plaintiff. Though it may not be a practical difficulty I think it is proper that the form of summons should be amended so as to show that the burden of proof does rest on the Official Assignee. This is a matter for the Rules Committee and one of no real difficulty, the only point of importance being to omit the words which call upon the garnishee to show cause why he should not be adjudged to be a debtor to the estate and substitute some other form of words which will make it clear that he is only called upon to meet a claim, the burden of proving which lies upon the Official Assignee.

Odgers, J.

Odgers, J.—In this case, I had prepared a separate judgment, but I agree so entirely with the judgment about to be delivered by my brother Beasley, J., that I do not feel I should be justified in taking up time by trying to express what he has so clearly enunciated. I agree that the appeal should be dismissed.

Beasley, J.

Beasley, J.—This appeal raises a question of the greatest importance in insolvency. It is an appeal from the order of Waller, J., dated the 13th February, 1928. One E. Narasimha Mudaliar is alleged by the Official Assignee of Madras to owe the estate of an insolvent A. Swaminatha Mudaliar Rs. 1,445-2-0. A summons was taken out by the Official Assignee in order to obtain that money from Narasimha Mudaliar. This summons has come to be known on the Insolvency Side of this High Court as a garnishee summons and the person summoned is known as the garnishee. When the matter came before Waller, J.,

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who was then sitting in insolvency, the garnishee admitted that he owed the insolvent Rs 173 and Waller, J., made an order for payment of that amount, but as regards the disputed balance, as the garnishee did not agree to that matter being tried out on that summons, Waller, J., ordered it to be tried elsewhere.

The question which arises in this appeal is whether the Insolvency Court has jurisdiction to make an order for payment by a stranger to the insolvency of money in respect of which that person disputes his indebtedness to the insolvent. Waller, J., in his judgment stated that the claim before him was very clearly a case under section 36 of the Presidency Towns Insolvency Act and I think that it is obvious that it was so from the wording of the summons. Before the Presidency Towns Insolvency (Amendment) Act of 1927 the Court could summon before it any person who was supposed to be indebted to the insolvent and examine that person and if on examination the Court was satisfied that he was indebted to the insolvent the Court could forthwith make an order upon him for the payment of the amount in which he was found to be indebted. But the Presidency Towns Insolvency (Amendment) Act of 1927 has brought about an alteration and sub-sections (4) and (5) of section 36 of the Presidency Towns Insolvency Act of 1909 have been amended by the substitution of the following words "if on his examination any such person admits" for the words "if on the examination of any such person the Court is satisfied." The result of this amendment is that where after an examination a person admits that he owes a sum of money to the insolvent, the Court can then and there order him to repay that amount to the Official Assignee, whereas before the amendment the Court could make that order even where there had been no such admission. In the case before us the garnishee admitted that he owed a portion of the amount claimed by the Official Assignee but disputed that he owed the balance. Waller, J, was, therefore, perfectly right in making an order upon him for the payment of the admitted amount and in declining to try the question of the disputed balance. The amendment to section 36 makes it quite clear that the Court has no jurisdiction whatever on a summons under that section to make orders for payment of debts disputed by garnishees This disposes of the appeal but we are asked to decide another important question arising out of this appeal as it is argued on behalf of the Official Assignee that section 7 of the Presidency Towns Insolvency Act of 1909 gives the Insolvency Court jurisdiction to try money claims made by

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the Official Assignee even where those claims are disputed by garnishees.

Section 7 is as follows:

"Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case"

The Official Assignee invites the Court to put the widest possible construction upon that section and to say that the Insolvency Court has jurisdiction to collect simple money debts owing to the insolvent's estate. It is argued by Mr. R. N. Aingar on the other side that section 7 only entitles the Insolvency Court to deal with matters arising in insolvency such as questions of fraudulent preferences and relation back and so on and that as regards simple money claims the Official Assignee merely stands in the shoes of the insolvent and has no greater rights conferred upon him by the Insolvency Law than the insolvent himself had before his insolvency. If that contention is well founded, then it is not necessary to consider what effect section 2 of the Presidency Towns Insolvency (Amendment) Act of 1927 has upon that section and it is therefore necessary to consider first of all whether the Insolvency Court before the amendment had jurisdiction to try simple money claims and, if it had, whether the section as amended has taken away or limited that right. In this connection there are two decisions of the English Courts, namely, *Ex parte Brown*[2] and *Ellis* v. *Silber*,[3] which are of great importance. In the former case it was held that the Court of Bankruptcy is the proper Court to try questions in which the trustee in bankruptcy has a higher and better title than the bankrupt, that is to say, in those cases where the Bankruptcy Act itself gives him that better title, for example, questions of fraudulent preferences; but where a trustee in bankruptcy does not stand in any higher position than the bankrupt himself would have stood, the Bankruptcy Court ought not to assume jurisdiction but should leave the matter to be dealt with by the ordinary courts. In the latter case Lord Selborne, L.C., said that the general proposition that whenever a trustee in bankruptcy has a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy was a proposition entirely without warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority. The position in Eng-

2 (1879) L.R. 11 Ch D. 148 3 (1872) L R. 8 Ch. App 83.

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land seems to be that the Bankruptcy Court does not entertain simple money claims by the trustee or Official Receiver in bankruptcy against strangers to the bankruptcy but that such claims are tried in other Courts unless there is an admission by the stranger to the bankruptcy on an examination that he is indebted to the insolvent, in which cases sub-section (4) of section 25 of the English Bankruptcy Act enables the Court to make an order upon him for payment, although Rankin, J., in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*,[1] said, "The power under the English Act has hardly been exercised but it is quite clear that it is exercisable," and the English section is the prototype of section 36 of the Presidency Towns Insolvency Act which before the recent amendment differed from it in that the Court could on the examination of such a person on being satisfied that he was indebted to the insolvent make the order for payment. This distinction has, however, now been removed by the Presidency Towns Insolvency (Amendment) Act of 1927, sub-section (4). It seems, therefore, that even under section 25 of the English Bankruptcy Act the Bankruptcy Court rarely exercises the power it has given to it by that section and *Ex parte Brown*[2] and *Ellis* v. *Silber*[3] are authorities for the statement that in England the Bankruptcy Court ought not to entertain simple money claims against strangers to the bankruptcy. But it is a question whether the Bankruptcy Court in England has not a discretion nevertheless to entertain such claims but does not exercise it. Conditions in England are totally different from those in this country and the collection of simple money debts where they are disputed by the debtors is a comparatively simple, speedy and inexpensive matter, whereas in India if the Official Assignee is to be compelled to file suits in every case against a stranger who contests the claim, his position will be an impossible one. He will have to incur heavy expenses in order to file those suits and will be obstructed by those who are indebted to the insolvent at every turn and there is no question that, if there is a discretion in the Insolvency Court to decide such claims in that Court and it is properly exercised, the collection of the assets of the insolvent must be a much simpler and less expensive matter. The question is whether section 7 does give the Insolvency Court such a discretion and the views expressed by Rankin, J., in *Jnanendra Bala Debi* v. *The Official Assignee of Calcutta*[1] are of great assistance on this point. The facts in that case were that a lady was alleged by the Official

1 (1925) I.L.R. 54 C. 251 at 263. 2 (1879) L.R. 11 Ch D. 148.
3 (1872) L.R. 8 Ch App. 83.

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Assignee to be a mere *benamidar* for the insolvent and she was summoned under section 36 of the Presidency Towns Insolvency Act and as a result of the examination of the lady the Official Assignee moved the Court for a declaration that she was merely a *benamidar* for the insolvent. On page 258, Rankin, J., stated as follows:—

"The ordinary course, having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have been to commence a suit against the lady for a declaration that she was a *benamidar* for the insolvent But under section 7 of the Presidency Towns Insolvency Act this Court in its insolvency jurisdiction has jurisdiction to determine such a point as that, just in the same way as where a person who carries on a retail business, becomes an insolvent in this Court, the Court would have jurisdiction by motion in insolvency to collect debts due to the business by third parties in Tipperah or somewhere else As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction, and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the insolvency jurisdiction to try such a question I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within section 55 or 56 of the Presidency Towns Insolvency Act There are many other cases There may be cases, for example, where a property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy and it can be successfully claimed if the opposite party cannot bring himself within the protective sections There may be cases where a transfer can be set aside if it is after an adjudication order There are cases which come under section 53 of the Transfer of Property Act, where the right asserted by the Assignee is a right which belongs to creditors as such It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's, is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case and, secondly, that it is not restricted only to sections 55 and 56 But the rule is well established if it is not rigid and it is necessary in fairness to third parties who cannot help their creditors, debtors or *cestuis qui trustent* going insolvent, who may live far from Calcutta, and whose right may be difficult to ascertain apart from a regular suit It is necessary also in the interests of this Court which cannot undertake in its Insolvency Jurisdiction to collect debts all over India or to decide on motion all classes of disputes merely because an insolvent or his estate is a party."

It is, I think, clear from this that Rankin, J., considered that the Insolvency Court had discretion under section 7 to deal with simple money demands and that right apparently has been exercised in the Calcutta High Court on its Insolvency Side. But I also gather from his observations that the usual procedure is not to proceed by way of motion but by regular suit. On page 263 after dealing with the examination under section 36, Rankin, J., says:

"It is quite true there is power to order the examination to be done by a Commissioner, but in that case I think it tolerably clear that sub-sec-

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tions (4) and (5) are out of action altogether although the same result can be obtained by proceeding under section 7 and using the deposition as evidence against the respondent What is contemplated under these sub-sections is the most summary of all proceedings, namely, an order made upon the witness there and then and without previous notice and it would be absolutely wrong ever to act under sub-section (4) or (5) unless there was a case so free from difficulty even on the story of the witness as to make it reasonable to act *brevi manu* It is quite extravagant to suppose that in this case and under this section any order could have been made. A question of this sort whether a purchase ten years ago in the name of a lady was a purchase *benami* is a long way from being within anything that section 36 contemplates The correct course in these cases where there is any real conflict is either to proceed by way of a motion before the Judge in Insolvency or to proceed by way of suit."

I see no reason for differing from the view expressed by Rankin, J, but the question is whether the amendment to section 7 and section 36 has altered the position as it then was in 1925 when that case was decided The amendment to section 36 I have already referred to and I now propose to deal with section 2 of the Presidency Towns Insolvency (Amendment) Act of 1927 which amends section 7 of the Act of 1909. The amendment is contained in a proviso which is as follows:

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36 be exercised only in the manner and to the extent provided in that section "

In view of the fact that I agree with Rankin, J., that section 7 before its amendment was not limited in its scope to matters in which the Official Assignee by the operation of the insolvency law claims a higher title than the insolvent would himself have had, I have to consider whether the amendment puts a limitation upon the jurisdiction of the Court and in this connection I have to consider why this amendment and the amendment to section 36 were introduced. It is obvious that the amendment to section 36 was to prevent anything like a summary trial and orders being passed against strangers to the insolvency except upon the admission of those persons. It was to prevent a contested enquiry under the guise of an examination under that section and I think it was intended by the amendment to section 7 to prevent the stranger to the insolvency from being first of all examined under section 36 and then under section 7 having used against him his deposition taken under the former section. I am of the view that it is only when the garnishee has previously been examined under section 36 that any limitation is placed upon the jurisdiction of the Court. The proviso says, "for the purpose of deciding any matter under section 36" and section 36 deals with the examination of persons

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suspected of being indebted to the insolvent. In all such matters the Court has no jurisdiction under section 7 to deal with them unless the garnishee admits his indebtedness. For the reasons I have already stated, in my view, the Official Assignee is entitled to proceed by way of motion under section 7 of the Act in those cases where he has a money claim against a stranger to the insolvency. It is then for the Court to say whether the matter is one which it is reasonable, having regard to the convenience of all concerned, to deal with on a motion or whether it should be dealt with in a regular suit But in my opinion no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims. Only simple cases capable of easy and speedy proof should be so dealt with But I am clearly of the opinion that, when once the Official Assignee has summoned a witness under section 36 of the Act, if that witness disputes his indebtedness the Official Assignee has then no option but to proceed by way of suit.

In the result, I agree with the learned Chief Justice and my brother Odgers, J., that the judgment of brother Waller, J., should be confirmed and the appeal of the Official Assignee dismissed.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

E. V. Balasundara Mudaliar .. *Appellant**

v.

K. Mahomed Oosman Sahib .. *Respondent.*

Indian Contract Act (IX of 1872), S 23—Opposed to public policy—Suit by a Mahomedan—Agreement with a Hindu to remunerate him for offering prayers to God Subramanya for his success in the suit—Validity

Balasundara Mudaliar v. Mahomed Oosman Sahib.

An agreement executed by a Mahomedan to a Hindu agreeing to pay a particular amount to the Hindu for prayers offered by the Hindu in the Mahomedan's name to God Subramanya for His divine blessings to the Mahomedan in a suit that had been instituted by him against other persons is not opposed to public policy.

Bhagwan Dat Shastri v Raja Ram, (1927) I L.R. 49 All. 705 distinguished

On appeal from the judgment of the Hon'ble Mr. Justice Waller, dated 16th January, 1928 and passed in the exercise

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*O.S.A. No. 24 of 1928. 15th March, 1929.

Balasundara Mudaliar v. Mahomed Ooman Sahib.

of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 705 of 1926.

R. Swaminatha Aiyar for appellant.

K. Narasimha Aiyar for respondent.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *The Chief Justice.*—As we have come [illegible] conclusion that this case must be remanded and disp[illegible] I desire to say as little about it as possible beyond [illegible]ary to indicate the grounds on which I dissent from the finding [illegible] the learned Judge which was that the agreement relied upon [illegible] the plaintiff is contrary to the public policy. It is a curious story and it shortly amounts to this: that the defendant who was a Mahomedan was engaged in litigation which, he hoped, would yield a large sum of money He requested the plaintiff who was a Bhakta of the God Subramanya to do puja to the God and to pray for his success in the litigation and promised to remunerate him amply for so doing; and "amply" was afterwards crystallised into a sum of no less than Rs. 5,000. The defendant in fact effected a compromise of the suit in which he was engaged. for which he received no less a sum than Rs. 32,500. The plaintiff thereupon brings this suit for payment of the agreement of Rs. 5,000 for his services and puja.

Such an agreement presents many strange features to a sceptical mind, but I am unable to bring myself to hold that it is on the face of it illegal as pleaded To my mind a man engaged in litigation believing himself to have a just cause may, without blame, pray himself to his God for success of the suit and, if he can pray without blame himself, I do not see anything wrong in his employing priest or a Bhakta to pray on his behalf for reward. On the other hand it is easy to see many ways in which such an agreement might be vitiated. I do not wish to indicate more precisely how it could be vitiated, because I do not wish to suggest defences which have not been raised or tried. It is enough to say that I do not think that this case is really covered by the authority of *Bhagwan Dat Shastri* v. *Raja Ram,*[1] assuming that case to have been rightly decided, of which I am by no means confident. The defendant, I think, on our view of the case, ought to have an opportunity to apply to the Lower Court to amend his pleadings and we so direct.

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1 (1927) I.L.R. 49 A 705.

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Ananta-krishna Aiyar, J.

Costs of the appeal to abide the final result. Court-fee paid on appeal to be refunded.

Anantakrishna Aiyar, J.—The plaintiff (Balasundara Mudaliar) claimed a sum of Rs. 5,500 being the principal and interest due under an agreement (Ex. A) executed by the defendant (Mahomed Oosman Sahib) in favour of the plaintiff on 2nd January, 1925. The suit was dismissed by the learned Judge on the ground that the agreement sued on was unenforceable as being opposed to public policy (Issue 1). The suit was not tried on the merits; so, it has to be taken that everything that has been alleged in the plaint is true for the purposes of this appeal.

The plaintiff is a Hindu, whereas the defendant is a Mahomedan. The defendant claimed to be a partner in a Mahomedan firm and was about to file a suit to recover his share of the profits. Before doing so, in the month of August, 1924, he requested the plaintiff who is described as a Bhakthan or devotee of God Sri Subramanya, to do puja to Subramanya Swami for his success. The plaintiff did puja for nine days and informed the defendant of the said Lord's command that the defendant would be successful in his proposed suit. The contemplated suit was filed on or about the 26th of September, 1924. The defendant about the beginning of October, 1924, again approached the plaintiff and asked him to offer further prayers and perform pujas in his name to God Subramanya daily so that the God might be pleased and the defendant might be sure of his success in that suit. The plaintiff thereupon informed the defendant that it would be sufficient if prayers were offered and pujas performed to God Subramanya daily both in the morning and evening for a period of two mandalams or 80 days in his name, and that the plaintiff should be amply remunerated. The defendant agreed that he would amply remunerate the plaintiff for such services In pursuance thereof the plaintiff performed pujas and offered prayers in the defendant's name daily both in the morning and evening to God Subramanya for a period of 80 days beginning from the 10th of October, 1924, till the end of December, 1924 "praying for His divine blessings to the defendant and for the success of the defendant in his said suit, C.S. No. 612 of 1924" The plaintiff further stated that on the 2nd of January, 1925, the defendant in consideration of the services rendered to him by the plaintiff as aforesaid agreed to pay him a sum of Rs. 5,000 and executed and gave to the

plaintiff a letter Ex. A, by which the defendant agreed to pay to the plaintiff the said sum of Rs. 5,500 if the Court should give a decree to the defendant herein, in the said suit for Rs. 50,000 or more. The defendant further undertook that, if he should settle his claim for any amount less than Rs. 50,000 then and in such event also the defendant was liable to pay the plaintiff the said sum of Rs. 5,000 which sum should be a first charge on the amounts to be realised in the said suit C.S. No. 612 of 1924. Suit No. 612 of 1924 was settled between the parties, the plaintiff therein (the defendant in the present suit) was to get Rs. 32,500; the defendant seems to have received the whole of the said amount in two instalments, and Suit No. 612 of 1924 was withdrawn on 21st July, 1925. The present suit was instituted on 29th November, 1926.

In paragraph 12 of the written statement the defendant stated that the consideration mentioned in the agreement is not lawful and cannot support the promise to pay any amount to the plaintiff; and in paragraph 14 he urged that the alleged consideration "being an invocation to a Hindu God Subramanya to unduly interfere with and prevent the course of justice, so as to bring success to one of the parties to a litigation is irreligious, illegal, immoral and opposed to public policy and cannot support the promise to pay." The learned trial Judge dismissed the suit, holding that the agreement alleged by the plaintiff is opposed to public policy. This is what he said:

"For the purpose of my decision I will assume that everything that has been alleged in the plaint is true What, to my mind, it all amounts to is this. that the plaintiff extracted from the defendant a promise to pay him a certain sum of money by guaranteeing that his intercession with Subramania Swami would secure a successful issue to his litigation. In other words, the consideration for the promise was an undertaking to ensure success by bringing some extraneous influence to bear on the mind of the Court; it seems to me clear that an agreement of this nature is opposed to public policy. The policy of the law no doubt is to enforce agreements as far as possible, but an agreement of this kind tends to affect the due administration of justice by bringing some extraneous influence to bear on the Court or on the opposite party Apart from that, the consideration for it is a promise to do something which most sensible persons would regard as being outside the range of possibility It is easy to see what undesirable consequences might ensue if promises of this nature were enforced. The plaintiff professed to have secured by his direct personal intervention a promise of success from the Deity and assured the defendant that 80 days' *puja* would make that promise secure. That is, I think, something totally different from undertaking merely the prayer for success What the parties intended was that the plaintiff should bring some extraneous influence to bear on the mind of the Court I find the preliminary issue against the plaintiff and dismiss the suit."

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Anantakrishna Aiyar, J.

The learned Judge relied on the decision of the Allahabad High Court, *Bhagwan Dat Shastri* v. *Raja Ram.*[1]

On looking into the plaint, I find therein recital of the plaintiff having performed puja for 9 days in the month of August, and of the plaintiff having informed the defendant "of the said Lord's command that the defendant would be successful in his intended suit." The present suit, however, is based on the allegations that the defendant after filing his Suit No. 612 of 1924 on the 26th of September, 1924, requested the plaintiff in October, 1924 to offer further prayers and perform puja to God Subramanya daily so that the God might be pleased and the defendant might be sure of his success in the said suit, that the plaintiff informed the defendant that it would be sufficient if prayers were offered and pujas performed to God Subramanya daily both in the morning and evening for a period of 80 days in the defendant's name, and that the plaintiff was prepared to do the same if the defendant would amply remunerate him for such services, that the defendant promised to amply remunerate the plaintiff for such services, that in pursuance thereof the plaintiff performed pujas and offered prayers in the defendant's name for a period of 80 days from 10th October, 1924 till the end of December, 1924 praying for His divine blessings to the defendant and for the success of the defendant in his said suit No. 612 of 1924, and that finally the defendant in consideration of the services rendered to him by the plaintiff as aforesaid agreed on 2nd January, 1925 to pay him a sum of Rs. 5,000 and gave the plaintiff Ex. A I am not able to see how this agreement is opposed to public policy. There is absolutely nothing wrong in a party to a suit asking somebody else to offer prayers to God in his name for the success of his suit. I fail to see how such an agreement "tends to affect the due administration of justice by bringing some extraneous influence to bear on the Court or on the opposite party." A litigant might believe in the justice of his case, and there is nothing wrong in offering prayers to God for the success of his case. The litigant may offer such prayers himself; or, if he thinks it worthwhile to do so, he may ask another to offer prayers in his name to God for the success of his case. I am not able to see anything wrong in this, either morally or legally It is not open to the Courts to devise new heads of public policy. As stated by Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Ltd.*[2]. I deny that any Court

1. (1927) I.L.R. 49 A. 705.   2 (1902) A.C. 484 at 491.

can invent a new head of public policy. The agreement in question not being unlawful, one is bound to enforce the same.

The decision in *Bhagwan Dat Shastri* v. *Raja Ram*[1] proceeded on the assumption, that "the plaintiff in that suit undertook to perform some kind of *puja*, which is referred to as '*Anushthan*' in order to cause the defendant to be successful in a suit which he had before the Courts. In the event of his success, the plaintiff was to get one-tenth of the decree money. The finding of the Court below is that the plaintiff undertook by prayer (*prarthana*) to bring extraneous influence to bear on the mind of the Court trying the defendant's suit. We think that the circumstances of this case distinguish it from one in which one person should merely have undertaken to pray to a righteous deity for the success of another's suit, for in such a case the deity being righteous would be understood only to exercise an influence in a just cause. In the present case the intention of the parties evidently was that the plaintiff should exercise some influence unauthorised by law on the minds of the Court."

The learned Judges who decided the Allahabad case, while granting that there would be nothing wrong in one person merely undertaking to pray to a righteous deity for the success of another's suit, base their decision on the special facts of the case before them, that "the intention of the parties was that the plaintiff should exercise some influence unauthorised by law on the mind of the Court." But in the case before me, having regard to the allegations in the plaint, I do not think that the Court would be warranted in presuming that the plaintiff undertook by prayer to bring extraneous influence to bear on the mind of the Court trying the defendant's Suit No. 612 of 1924. All that I am concerned to say at present is that an agreement by the defendant to the plaintiff to pay a particular amount to the plaintiff for prayers offered by the plaintiff in the defendant's name to God Subramanya for His divine blessings to the defendant in Suit No. 612 of 1924 could not be presumed to be contrary to public policy.

No doubt it strikes one *prima facie* as curious that the defendant, a Mussalman, should agree with the plaintiff, a Hindu, that plaintiff should offer prayers to a Hindu God Subramanya in defendant's name for Divine blessings and for success of the defendant in his suit against a firm for dissolution of partnership and for his share of the profits. The defendant may perhaps be able to show that the agreement Ex. A is vitiated,

1. (1927) I.L.R. 49 A. 705.

Balasundara Mudaliar v. Mahomed Oosman Sahib.

Anantakrishna Aiyar, J.

but as the suit has not been tried on the merits it is right that one should not say more than is absolutely necessary at this stage.

I am of opinion that the dismissal of the suit on the ground that on the face of it the agreement set out by the plaintiff is contrary to public policy could not be sustained. The parties at one stage seemed agreeable to report settlement to the Court, but as the same has not been done, there is no alternative but to reverse the decision of the learned Judge and remand the suit for disposal according to law. The costs of this appeal will abide the result. The Court-fee paid on appeal memorandum will be refunded to the appellant on his application.

N.S. *Appeal allowed and case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Musammat Jaggo Bai . *Appellant** (*Plff.*)

v.

Utsava Lal .. *Respondent* (*Deft.*).

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*Civil Procedure Code (V of 1908), O 2, R. 2—Pensions Act, 1871—Certificate under—Absence of—Dismissal of suit on ground of—Suit subsequent instituted after obtaining such certificate—Not barred—Hindu Law—Daughter—Suit after death of mother (life-tenant) for possession of house appertaining to father's estate—Maintainability—Suit by her during mother's life-time to establish her right to her father's estate as reversionary heir—Omission to include house in—Effect—*Malikana*—Right to receive, forming part of father's estate—Suit by daughter after mother's death for declaration of her right as regards the* malikana *amount—Limitation—Starting point—Arts 141 and 120 of the Limitation Act—Applicability—Hindu Law—Widow—Adverse possession against—Effect on reversioner of—Decree against widow founded upon adverse possession—Effect of—Distinction—Law under Limitation Acts of 1871, 1877 and 1908.*

Where, owing to the absence of a certificate under the Pensions Act, 1871, the Court in a previous suit instituted by the plaintiff had no jurisdiction and was not competent to deal with the question of *malikana, held,* that a subsequent suit instituted by the plaintiff in respect of the *malikana,* after obtaining the necessary certificate under that Act, was not barred under O 2, R 2 of Civil Procedure Code of 1908

The plaintiff's claim to the *malikana* was not, in the circumstances of the case, part of the claim which she was entitled to make in the previous suit

During the life-time of her mother, the life-tenant, the daughter of a deceased Hindu instituted a suit against, *inter alia,* her aunt, seeking to establish her title to her father's estate as heir in reversion on her mother's death. In that suit the daughter omitted to include a house which apper-

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*P C Appeal No. 115 of 1927. 19th April, 1929.

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tained to the estate of her father but to which the aunt set up some sort of claim

Held, that that omission was not a bar under O. 2, R. 2 of Civil Procedure Code of 1908 to a suit instituted by the daughter after the death of her mother to recover possession of the house upon the footing that it formed part of her father's estate and that the defendant, who claimed through the aunt, was in wrongful possession of it.

In the prior suit the daughter was not seeking, and could not then have sought, to recover possession from the aunt of any particular item of property forming part of her father's estate The cause of action in the present suit arises out of tortious conduct on the part of the defendant or his predecessor the aunt in respect of the house, and is a cause of action distinct from that in the previous suit The claim which the plaintiff is now making could not in fact have been made in the previous suit.

Where a decree founded upon the law of limitation is obtained against a Hindu widow in her life-time the reversionary heir is barred and does not get the benefit of Art. 141 of the Limitation Act.

Where, however, there has been no decree against the widow or other act in the law in the widow's life-time depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art 141 for the purpose of the determination of the question whether the title is barred by lapse of time.

A Hindu widow in possession of her husband's estate as his heir purported to release immoveable property appertaining to the estate to Government in return for a perpetual *malikana*. After her death, the daughter of the last male owner sued to establish her right as reversionary heir to the said *malikana* The suit was instituted within six years of her obtaining the necessary certificate from the Collector under the Pensions Act, 1871

Held, that, even in the view that the *malikana* was immoveable property, still, in view of the language of the plaint and the form of the relief sought therein (namely, declaration of the plaintiff's right as regards the *malikana* amount), the suit was not one for possession or within the operation of Art. 141 of the Limitation Act; that it was governed by Art. 120 of that Act; and that, having been instituted within six years of the grant of the certificate under the Pensions Act, it was not barred.

Under the Pensions Act, 1871, there is no right of action at all in respect of such a subject-matter as the *malikana* unless and until a certificate under the Act has been obtained.

Appeal No. 115 of 1927 from a judgment and decree of the High Court, Allahabad (Mears, C.J. and Lindsay, J.), dated the 26th November, 1925, reversing a judgment and decree of the Court of the Subordinate Judge of Banda, dated the 19th May, 1922.

The material facts of the case are set forth in their Lordships' judgment. The proceedings at an earlier stage of the case are reported in 21 Indian Appeals 148.

The suit giving rise to the present appeal was brought by the appellant for a declaration that she was entitled to a certain *malikana* and to eject the respondent (defendant) from a house. The main question for determination on the appeal to the Privy

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Council was, whether at the time of the suit the appellant had a subsisting title to the said two items?

Of the issues framed by the Subordinate Judge only the following are now material:—

(7) Was Mussamat Man Koer in adverse and proprietary possession of the *malikana* allowance and the house at Warnagar in question for over 12 years?

(8) Is the suit barred by limitation?

The learned Subordinate Judge delivered judgment on the 19th May, 1922, holding that though Man Koer had been in possession of the house at Warnagar and the *malikana* allowance for more than 12 years, such possession was not adverse to the appellant (plaintiff) who was a reversionary heir of Uttam Ram; that time began to run against the appellant only from 1914 when her mother died and as the suit was brought within 12 years from 1914 it was not barred by limitation. The learned Subordinate Judge concluded his judgment, on this part of the case, in the following terms:

"It has been repeatedly decided that possession taken by a trespasser during the life-time of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow, vide *Ganga* v. *Kanhai Lal,* (1918) 17 A L J 44"

The respondent (defendant) then appealed to the High Court at Allahabad and that Court (Sir Grimwood Mears, C.J. and Mr. Justice Lindsay) delivered judgment on the 26th November, 1925, in favour of the defendant-respondent and passed a decree dismissing the plaintiff's suit. The learned Judges held that Deo Koer, in her suit against Man Koer, fully represented her husband's estate and was not merely acting on her own behalf or in her personal interest; that Man Koer had been appropriating the *malikana* from 1880 under an assertion of her own title against Uttam Ram's estate which Deo Koer represented; that adverse possession of the *malikana* right by Man Koer began to run from 1880 if not earlier and as more than 12 years had expired since that time, the title of Deo Koer or her successor in interest had been extinguished by lapse of time and Man Koer had acquired a good title thereto. With regard to the house at Warnagar they held that though it had been admittedly in the possession of Man Koer it had never been claimed in any of the previous suits and therefore the title of the heirs of Uttam Ram to that also had been lost by prescription.

In the course of their judgment, the learned Judges of the High Court enunciated the law on the subject in the following words:—"It is now well established that in cases where the widow represents the estate, adverse possession which begins to run against the widow will continue running and may defeat the claims of the reversioner whose title ripens after the widow's death."

De Gruyther, K.C. and *Abdul Majid* for appellant.

Upjohn, K.C. and *Parikh* for respondent.

Arguments with regard to Art. 141, *Limitation Act, and effect of adverse possession against widow.*

De Gruyther, K C. for the plaintiff-appellant urged that the possession of Man Koer even if adverse to Deo Koer who held the estate as Uttam Ram's widow was not adverse to the plaintiff-appellant who was a reversioner, and he cited *Srinath Kur* v. *Prosunno Kumar Ghose*,[1] *Ram Kali* v. *Kedar Nath*,[2] *Cursandas Govindji* v. *Vundravandas*[3] and *Venkataramayya* v. *Venkatalakshmamma*[4] in support of the general proposition that possession adverse to the widow was not adverse to the reversionary heir. The Board in *Runchordas's case*[3] in substance affirmed the principle laid down in the above four cases. The decision in *Vaithialinga Mudaliar* v. *Srirangath Anni*[6] does not decide anything to the contrary. Referred to *Bankey Lal* v. *Raghunath Sahai*,[7] where all the relevant decisions on the subject are discussed. The case of *Lachhan Kunwar* v. *Manorath Ram*[8] is distinguishable. The Hindu widow there had merely a right to maintenance. As to the nature of a Hindu reversioner's right in the property which the female owner holds for her life see *Amrit Narayan Singh* v. *Gaya Singh*.[9] Limitation does not, under the present law, run against the reversioner until the death of the widow. The observations to the contrary were made in cases decided under the Limitation Act of 1859. The Act of 1871 altered the law: Mayne's Hindu Law, paras. 642 and 643.

Upjohn, K C. for respondent (defendant).—The doctrine enunciated in *Shivagunga case*[10] is this, that a Hindu female heir,

1. (1883) I.L.R. 9 C 934. 2. (1892) I.L.R. 14 A. 156.
3 (1889) I.L R. 14 B 482 4 (1897) I.L.R. 20 M 493.
5 (1899) L.R. 26 I.A. 71
6 (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883 49 M.L.J. 769 (P C.)
7. (1928) 26 A.L.J. 1049 (F.B.).
8. (1894) L R. 22 I A. 25 I.L R. 22 C. 445: 5 M.L.J. 1 (P.C.).
9 (1917) L.R. 45 I.A. 35 34 M.L J. 298 (P C.).
10. (1863) 9 Moo. I A 539.

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as being the person in whom the whole estate is vested for the time being, is a complete owner, and in her actions and omissions she is considered as representing the estate, and the result is that the person who is called a reversioner or next taker, when ascertained, is often bound by the acts of the female heiress, although he does not claim from her. See *Nobin Chunder* v. *Issur Chunder Chuckerbutty*,[11] the judgment of Sir Barnes Peacock and his learned colleagues. Suppose there is no decree, but mere long adverse possession against the female heir, it was decided by Sir Barnes Peacock in the above case that it ought to have the same effect against the next heir as a decree against her.

[*Lord Blanesburgh*.—It is rather hard on the reversioner to be barred, if the female lived for a great many years]

The female heiress represents the estate, and the reversioner has to take his chance whether the heiress is alert or not in asserting her rights. *Vaithialinga's case*[6] deals with this very point.

[*Lord Tomlin*.—When you have a suit brought against a widow which results in an adverse verdict against her, that would bind the reversioner, but if there is no decree, then, however long the adverse possession may be against her, it would be open to the reversioner to sue within 12 years of her death. *See* Art. 141.]

I rely on *Vaithialinga's case*.[6] The Board there devoted several pages to the discussion of this question.

[*Sir Lancelot Sanderson*.—The observations there were *obiter*. Does Art. 141 imply that it is not to apply if the female is already barred by adverse possession?]

Refers to U. N. Mitra's Law of Limitation, Vol. I, p. 46, and Bengal Regulation II of 1805, and the first general Limitation Act, XIV of 1859, section 1, sub-section (12).

[*Lord Blanesburgh*—That sub-section is in effect Art. 144 of the present Act.]

Refers to Art. 141 of the Limitation Act, 1877, and Mitra's Law of Limitation, Vol. II, page 1143.

[*Sir Lancelot Sanderson*.—That Article is exactly the same as in the present Act.]

Reads from the judgments in *Nobin Chunder's case*.[11]

[*Lord Blanesburgh*.—It was a decision under the Limitation Act of 1859.]

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6. (1925) L.R. 52 I.A. 322 : I L.R 48 M. 883 : 49 M L.J. 769 (P.C).
11. (1868) 9 W.R. 505 (F B).

There has been no change made in the law by the later Limitation Acts; see the word "entitled" in Art. 141.

[*Lord Blanesburgh.*—Mr. Mayne says in para. 643 that that is not the proper construction under the later Acts of 1871 and 1877.]

Refers to *Hurrinath Chatterji* v. *Mothoor Mohun*[12] and the observations of Lord Watson during the course of the argument in that case. Sir R. Couch, in delivering judgment, said: "The words 'entitled to the possession of immoveable property' (in Art. 141) refer to the then existing law. . . . The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." These observations, if I may say so, hit the bird in the very eye.

[*Lord Blanesburgh.*—All that their Lordships laid down there was that if there is a decree against the widow, the reversioners cannot come in within 12 years of her death, but when there is no suit, and mere adverse possession, then, according to Mayne's Hindu Law, the reversioner has 12 years from her death under the new Limitation Act.]

It would be very anomalous that the reversioner should be barred if there is a decree against the widow, and not barred if there is no decree.

[*Lord Tomlin.*—*Nobin Chunder's case*[11] was the then existing law, and the question is, whether under the Act of 1871, a new right of action is given to the reversioner]

The word "entitled" in Art. 141 refers to the existing law: see *Hurrinath Chatterjee's case.*[12] When the widow herself is barred by adverse possession, the reversioner is also barred, as he would not be "entitled" to the possession.

[*Lord Blanesburgh.*—The Act of 1871 would prevent the property from being transferred to the squatter until the lapse of 12 years from the death of the widow. Under the Limitation Act of 1859 the reversioner had to take the estate as he found it. Do you suggest that the Act of 1871 did not alter the law?]

Yes. In no other Article of the Limitation Act do we find the description of a plaintiff as a "person *entitled*" to possession of property, except in Art. 141. My submission is that the later Acts of 1871, 1877 and 1908 have made no change in the law.

11 (1868) 9 W.R. 505 (F B)
12. (1893) L.R. 20 I.A. 183; I.L.R. 21 C. 8 (P C.).

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and the Legislature in Art. 141 has advisedly used language not to alter the old law.

Arguments with regard to Malikana and Limitation.

De Gruyther, K.C., for the appellant.—The claim in respect of the *malikana* is not statute-barred. Refers to section 28, Limitation Act, and Arts. 48 and 49.

[*Lord Tomlin.*—I think that section 28 covers the case of moveable property also.]

Except under section 28, there can be no extinguishment of title. There is no specific Article in the Limitation Act barring my right to the *malikana* The only Article applicable to a declaratory suit is Article 120, which is a general provision.

[*Sir Lancelot Sanderson,* referring to the third column of Art. 120, "when the right to sue accrues," observed: If that Article applies, your suit for declaration is obviously time-barred.]

I am not suing for a declaration.

[*Lord Tomlin.*—Six years having elapsed between the death of the widow and the institution of your suit, if Art. 120 applies, you are out of time. Even granting your contention that time did not run until the death of the widow, the suit for the declaration would still be barred by Art. 120.]

It is not my case that Art. 120 applies.

[*Lord Blanesburgh.*—Why not?]

[*Lord Tomlin.*—Arts. 48, 49, relating to specific moveable property, cannot apply to *malikana.*]

[*Sir Lancelot Sanderson.*—*Malikana* means a right to receive money from Government. Surely it does not come within Arts. 48 and 49.]

[*Lord Blanesburgh.*—If there is no other provision in the Act, we must fall back upon Art. 120]

Malikana being immoveable property, Art. 120 has no application.

Upjohn, K.C.—Art. 120 does not exclude from its operation cases of immoveable property.

Refers to *Mullick Abdool Guffoor* v. *Muleka*[13] paragraph 4, beginning, "A *malikana* right is the right to receive from the Government a sum of money."

[*Lord Blanesburgh.*—The only point now under discussion is that of limitation. Is *malikana* immoveable property?]

13 (1884) I.L.R. 10 C 1112 at 1125.

[*Sir Lancelot Sanderson.*—We are bound to give effect to the statute of limitation, even if it is not raised: *see* section 3.]

[*Lord Tomlin.*—It is the duty of the Court *suo motu* to see if the statute applies.]

[*Sir Lancelot Sanderson.*—If it is clear to this Tribunal that a particular Article of the Limitation Act applies, we are bound to give effect to the statute, even though both the parties in the Indian Courts have assumed that a wrong Article applies.]

Yes, if the facts on the record are clear, the Court may take notice of the statute of limitation and give effect to the appropriate Article. The main question here is, whether *malikana* is moveable or immoveable property.

[*Lord Blanesburgh.*—The term of 12 years is applicable only in the case of immoveable property.]

Refers to U. N. Mitra's Law of Limitation, Vol. I, p. 279, as to "immoveable property," and the definition of the expression in the General Clauses Act.

Upjohn, K.C., for respondent-defendant.—Art. 141 does not apply to the claim for *malikana*. Under section 3 of the Limitation Act it is the duty of the Court to find out the particular cause of action, and if it comes within the Act, it is obligatory upon the Court to dismiss the suit. As to the nature of the *malikana* right, it has nothing to do with land. Its connection with the land is purely historical. It is not a grant of land revenue. It is a grant of money, of an annual sum in perpetuity. Pensions Act, 1871, cited.

[*Lord Tomlin* refers to the definition clause in section 3 of the Pensions Act.]

[*Lord Blanesburgh.*—Shortly stated, what is meant by the definition in section 3 is that a grant of money or land revenue includes a pension.]

[*Lord Blanesburgh.*—If *malikana* is not immoveable property, then the plaintiff is out of time.]

To determine whether a claim is time-barred, we must consider (1) what is the nature of the property, and (2) what is the nature of the suit. Appellant's learned counsel, Mr. De Gruyther, relied upon Art. 141. To see what is meant by the words "like suit" in Art. 141, we must look at the preceding Art. 140 to ascertain how much of it is imported into Art. 141. The expression "like suit" in Art. 141 means a suit for possession of immoveable property by a Hindu or Muhammadan entitled, etc.

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[*Lord Blanesburgh.*—Art. 141 says "entitled to" in substitution for a remainderman or reversioner.]

The person entitled is not a reversioner, but an heir to be ascertained on the death of the Hindu female. Refers to the plaint, paragraph 13. It is not a claim to recover possession, but a claim for a declaration of right as regards the *malikana*. It does not come under Art. 141.

[*Sir Lancelot Sanderson.*—Art. 141 is confined to suits for possession of immoveable property.]

[*Lord Tomlin.*—In England it has been held that an action for a declaration of title is an action to recover land.]

Cites *Janaki Ammal* v. *Narayanasami Aiyar*[14] Lord Shaw's judgment, 2nd paragraph, beginning, "The rule of the Hindu Law with regard to the nature of the widow's estate."

[*Sir Lancelot Sanderson.*—There have been decisions in India to the effect that to see the real nature of the claim, we must look at the plaint.]

[*Sir Lancelot Sanderson.*—If the case as regards *malikana* does not come under Art. 141, why should Art. 144 not apply? It refers to "an interest in immoveable property."]

I submit that on the true construction of the document in question, *malikana* here is not immoveable but moveable property and, in any case, it is Art. 120 and no other Article which is applicable.

Argument with regard to res judicata.

De Gruyther, K.C. for appellant—The claim for *malikana* was not barred by O. 2, R. 2, Civil Procedure Code. The *malikana* was not "omitted" in the previous suit. Section 11, Civil Procedure Code, cited and *Ramachandra Rao* v. *Ramachandra Rao*[15] and *Pittapur Raja* v. *Suriya Rau*[16] referred to.

[*Lord Tomlin.*—In other words, you could not have included the *malikana* in the previous suit for want of the appropriate certificate under the Pensions Act.]

19th April, 1929. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal from a decree, dated the 26th November, 1925, of the High Court of Judicature at Alla-

14. (1916) L.R 43 I A. 207: I L.R 39 M. 634 at 637 31 M.L.J. 225 (P C).
15 (1922) L.R. 49 I A. 129. I.L.R. 45 M. 320: 43 M L.J. 78 (P.C).
16 (1885) L.R. 12 I.A. 116. I.L.R. 8 M. 520 (P.C).

habad reversing in part a decree, dated the 19th May, 1922, of the Subordinate Judge of Banda.

The plaintiff is under Hindu Law the heiress of her father, Uttam Ram, who died on the 30th October, 1875, without having had a son. Her right to possession of her father's estate did not accrue until February, 1914, on the death of her father's widow, Deo Koer (hereinafter called the mother). The mother was entitled to the estate while living.

At the death of Uttam Ram there were also living his mother, Jarao Bai (hereinafter called the grandmother), and his deceased brother's widow, Man Koer (hereinafter called the aunt).

The estate of Uttam Ram included (*inter alia*) several villages, an 8-anna share in the village of Pachnehi, and a house at Warnagar in Baroda.

The other 8-anna share in the village of Pachnehi was owned by Durga Prasad, who was a debtor to the estate of Uttam Ram.

After Uttam Ram's death the aunt, with the assistance apparently of the grandmother, got possession, to the exclusion of the mother, of some of the villages or of a half share therein, and also of the house at Warnagar. The grandmother died in 1877.

By a document, dated the 10th September, 1880, Durga Prasad, the mother and the aunt affected to release the village of Pachnehi to the Government in return for a perpetual *malikana* of Rs. 2,000, one-half of which represented the share of Uttam Ram's estate in the village and the other half of which represented the share of Durga Prasad therein.

By a sale-deed, dated the 6th October, 1880, Durga Prasad made over Rs. 500, representing one-half of his share in the *malikana* to the mother and the aunt in satisfaction of his indebtedness to Uttam Ram's estate. Thereafter, therefore, Rs. 1,500 out of the *malikana* of Rs. 2,000 formed part of Uttam Ram's estate. In fact, the mother and the aunt received payment of the *malikana* of Rs. 1,500 in equal moieties.

In 1886 the mother began a suit (No. 237 of 1886) in the Court of the Subordinate Judge at Banda against the aunt, seeking to establish her title as an heir of Uttam Ram to the villages, or share of villages, in the aunt's possession, and to dispossess the aunt therefrom, and to establish her title to the whole

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of the *malikana* of Rs. 1,500. No reference was made in the plaint to the house at Warnagar.

The Subordinate Judge gave judgment in favour of the mother in respect of the villages, but held that in the absence of a certificate under the Pensions Act, 1871, the Court was not competent to deal with the *malikana*. The decision of the Subordinate Judge as to the villages was reversed on appeal to the High Court of Judicature at Allahabad. Thereupon the mother appealed to His Majesty in Council.

Pending the appeal of the mother to His Majesty in Council the plaintiff began a suit (No. 481 of 1890) in the Court of the Subordinate Judge of Banda against the mother and the aunt, seeking to establish her title as reversionary heir of Uttam Ram, subject to the mother's interest as widow to the immoveable property of Uttam Ram mentioned in the plaint, including the villages of which, or of a share of which, the aunt had possession. The plaintiff also sought to have a document, dated the 9th October, 1877, purporting to be an arbitration award on which the aunt relied, declared invalid. The plaint referred to the village of Pachnehi, but contained no reference to the house at Warnagar.

On the 30th June, 1891, the Subordinate Judge declared that the plaintiff was entitled to succeed to the property in dispute on the mother's death, and that on the mother's death the arbitration award of the 9th October, 1877, and other proceedings by which the aunt had become possessed of the property in dispute would be void as against the plaintiff.

On the 16th January, 1894, an appeal by the aunt to the High Court of Judicature at Allahabad was dismissed with costs.

In the meantime the mother's appeal to His Majesty in Council in the Suit No. 237 of 1886 came before their Lordships' Board, and in July, 1894, the appeal was allowed, and the judgment of the Subordinate Judge was restored in respect of the villages in dispute, but the view of the Courts below that under the Pensions Act, 1871, there was no jurisdiction in the absence of a certificate to deal with the *malikana* was affirmed (see *Deo Kuar* v. *Man Kuar*[1]).

As the result of this litigation the mother apparently recovered possession of all the villages, but the aunt continued to

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1. (1894) L.R. 21 I.A. 148: 4 M.L.J. 272 (P.C.).

receive one-half of the *malikana* of Rs. 1,500, and remained in possession of the house.

The mother died in February, 1914, and, thereupon, the plaintiff succeeded to the property, possession of which had been recovered from the aunt.

The aunt died on the 20th June, 1920, having by her will, dated the 3rd July, 1919, affected to dispose in favour of her nephew, the defendant, of the share of the *malikana* which she was receiving and of the house at Warnagar.

The plaintiff then claimed to be entitled to the whole of the *malikana* of Rs 1,500 and to the house. In consequence of the dispute the Government withheld payment of the *malikana*.

On the 15th December, 1920, the plaintiff having first obtained the necessary certificate under the Pensions Act, 1871, launched against the defendant the present suit in the Court of the Subordinate Judge of Banda.

By her plaint the plaintiff alleged (para. 9), that she was in possession of the entire property which was in the possession of the mother, but that on the death of the aunt it was found that the aunt had executed a will, dated the 3rd July, 1919, in favour of the defendant in respect of the *malikana* amount certain *muafi* property and the house at Warnagar, whereas the aunt had not title or power to make a will, that the aunt was in possession merely in lieu of maintenance allowance as a widow of the family and that for this very consideration she had not been deprived and dispossessed of the *malikana* amount and other property, and that the will was totally invalid and ineffectual against the plaintiff, and (para. 13) that the mother as a widow had only a life-interest in the family property, and that the aunt had no right in the property except that of maintenance, that the mother had no power to transfer to the Government by means of the document of the 10th September, 1880, the village of Pachnehi, which was of considerable value, and that, therefore, the plaintiff wanted to bring a suit for recovery of possession of the said property, but that as the time for the suit given in the certificate would expire on the 19th December, 1920, and as, according to law, it was necessary to give a formal notice to Government before the institution of a suit for recovery of possession of the property the plaintiff had in the plaint included only a claim for declaration of right as regards the *malikana* amount by invalidation of the will subject to her rights regarding recovery of possession of the property.

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The plaintiff then asked (*inter alia*) for the following relief: (*a*) That it might be declared that the alleged will of the aunt was invalid and unenforceable as against the rights of the plaintiff, and that by means of it the defendant had not acquired any rights to get Rs. 750, the *malikana* amount or any right in other property in respect of which the will had been made, and (*b*) that the plaintiff might be put in possession of the *muafi* property and the house at Warnagar by dispossession of the defendant.

On the 19th May, 1922, the Subordinate Judge ordered that the plaintiff's claim for a declaration as prayed in respect of the *malikana* and the house at Warnagar, and her claim for recovery of possession of the house be decreed. In his judgment the learned Judge held that the suit was not barred by Rule 2 of Order 2 of the Code of Civil Procedure, and that the aunt had not been in adverse possession of the *malikana* and the house for over twelve years as against the plaintiff. He also held that the plaintiff's claim was not barred by the Limitation Act, and that the aunt had no right to dispose by her will of the *malikana* or the house. The Judge dismissed the suit as to the *muafi* lands, and there was no appeal by the plaintiff as to this part of his decision.

The defendant appealed to the High Court of Judicature at Allahabad against the decree so far as it was adverse to him. On the 26th November, 1925, the High Court allowed the appeals, set aside the decree of the Subordinate Judge so far as it related to the *malikana* and the house, and dismissed the suit. In the judgment of the High Court it was held that the aunt had been in adverse possession, that time began to run against the plaintiff in the lifetime of the mother when the aunt first took possession and that the plaintiff was, therefore, statute barred. It was further held that as in the previous suit (No. 481 of 1890) by the plaintiff against the mother and the aunt there had been no jurisdiction in the absence of a certificate to deal with the *malikana*, and as the house had not been included in the suit there was no *res judicata* binding the plaintiff.

The plaintiff obtained leave to appeal to His Majesty in Council, and appealed accordingly.

Before their Lordships' Board it was but faintly contended by the plaintiff that the possession of the aunt had not been adverse, and their Lordships are of opinion that it was adverse.

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On the part of the plaintiff it was urged that Article 141 of the Limitation Act applied, and that as under that article in a suit for possession by a Hindu entitled to possession of immoveable property on the death of a Hindu female the time allowed is twelve years from the death of the female, the plaintiff was entitled to succeed on the appeal, because at the institution of the suit twelve years had not run from February, 1914, the date of the death of the mother.

On the part of the defendant it was contended (1) that by reason of Rule 2 of Order 2 of the Civil Procedure Code the plaintiff was precluded from bringing the suit, having regard to the fact that she had in the previous suit (No. 481 of 1890) against the mother and aunt already sought to establish her title as heir; (2) that the *malikana* was not immoveable property; (3) that in regard to the *malikana* the suit was not a suit for possession, and that, therefore, Art. 141 of the Limitation Act, 1908, did not apply; (4) that so far as the *malikana* was concerned Art. 120 applied, and that under that Article six years only from the date when the right of action accrued is allowed, with the result that as more than six years had run between the date of the mother's death and the institution of the suit the plaintiff's claim in respect of the *malikana* was statute barred; and (5) that upon the true construction and effect of Art. 141 of the Limitation Act, 1908, a reversionary heir is not entitled to the benefit of twelve years from the death of the female in a case where at the death of the female adverse possession had already run for twelve years against her in her lifetime, and that as the aunt had been in adverse possession against the mother for more than twelve years before the mother's death this Article could not avail the plaintiff, and that the barring of the mother in her lifetime had, upon the principle of the *Shivagunga case*,[2] operated to bar the interest of the plaintiff.

These contentions of the defendant accordingly require to be dealt with seriatim:

(1) By Rule 2 of Order 2 of the Civil Procedure Code it is provided (sub-cl. 1) that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but that a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the Court, and (sub-cl. 2) that where a plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim

2. (1863) 9 M.I.A. 539.

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he shall not afterwards sue in respect of the portion so omitted or relinquished.

By reason of the absence of a certificate under the Pensions Act, 1871, the Court, in the previous suit (No. 481 of 1890), was not competent to deal with the question of the *malikana,* and the plaintiff had no right of action in respect of it. In their Lordships' opinion the plaintiff's claim to the *malikana* was not, therefore, part of the claim which she was entitled to make in the previous suit. The house was not mentioned in the previous suit. In that suit the plaintiff was seeking to establish her title to her father's estate as heir in reversion on her mother's death. She was not seeking, and could not then have sought, to recover possession from the aunt of any particular item of property forming part of that estate. In the present suit she is seeking to recover possession of the house upon the footing that it forms part of the estate and that the defendant is in wrongful possession of it. The present cause of action arises out of tortious conduct on the part of the defendant or his predecessor the aunt in respect of the house, and is in their Lordships' opinion, a cause of action distinct from that in the previous suit. The claim which the plaintiff is now making could not in fact have been made in the previous suit.

The first contention of the defendant therefore fails.

(2) Their Lordships are satisfied that the point as to the *malikana* not being immoveable property was not taken in either of the Courts below, and that each of the Courts below treated the *malikana* as immoveable. In these circumstances, the defendant not being willing that there should be any remand of the case for further evidence, their Lordships are of opinion that the point is not open.

(3) Having regard to the language of paras. 9 and 13 of the plaint in the suit and to the form of the relief sought therein, their Lordships do not consider that the suit so far as the *malikana* is concerned is a suit for possession or within the operation of Art. 141 of the Limitation Act.

(4) In their Lordships' view Art. 120 is the relevant article so far as the *malikana* is concerned. Under the Pensions Act, 1871, however, there is, in their Lordships' opinion, no right of action at all in respect of such a subject-matter as the *malikana* unless and until a certificate under the Act has been obtained. Their Lordships therefore hold that as less than six years had run between the grant of the certificate and the institution of

the present suit the plaintiff's claim in respect of the *malikana* is not statute barred under Article 120.

(5) Article 141 of the Limitation Act, 1908, admittedly applies to the claim to recover possession of the house. The point raised by the defendant upon the construction and effect of this article is of importance, and is one upon which there has been some difference of opinion in India.

Under Act XIV of 1859, suits for the recovery of immoveable property had to be brought within twelve years from the time when the cause of action arose. The Limitation Act of 1871, which repealed the Act of 1859, employed different language. Article 142 in the second schedule of that Act prescribed for a suit for possession of immoveable property by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow a period of limitation of twelve years beginning to run from the time when the widow died. This provision, enlarged so as to cover a suit by a Mahomedan, was reproduced in the Act of 1877, and again in Article 141 of the Act of 1908.

The judgment of their Lordships' Board in the *Shivagunga case*[2] established the principle of the representation of the inheritance by a Hindu widow. That case was decided during the currency of the Act of 1859.

In *Hurrinath Chatterjee* v. *Mothoor Mohun*[3] their Lordships' Board held that the effect of the Acts of 1871 and 1877 was not to except from the rule laid down in the *Shivagunga* decision the case where a decree had been obtained against a Hindu widow in her lifetime founded upon the law of limitation. Sir Richard Couch, in delivering the judgment of the Board, said: "Their Lordships see no ground for this contention" (*i.e.*, that the case was excepted). "The words 'entitled to the possession of immoveable property' refer to the then existing law."

It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Article 141.

The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger has been in adverse possession for twelve years or more.

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2. (1863) 9 M.I.A. 539. 3. (1893) L.R. 20 I.A. 183: I.L.R. 21 C. 8 (P.C.).

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In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Article 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the article to ignore the express words of the article.

But their Lordships are further of opinion that the point is already concluded by the judgment of their Board in *Runchordas Vandrawandas* v. *Parvatibhai.*[4] In that case a testator who died in 1869, leaving two widows, devised the whole residue of his estate to trustees for *dharam*. One widow died in 1871, and the other died in 1888. After the death of the second widow the heir of the testator sued for a declaration that the devise to *dharam* was void and for administration. The High Court held that the gift in *dharam* was invalid and there was an intestacy. The High Court further held that the possession of the trustees for *dharam* since the testator's death had been adverse as against the widows and the heir but that the plaintiff's claim to the immoveable property was not barred. It was also held that the plaintiff's claim to the moveable property was barred by limitation. On appeal to His Majesty in Council their Lordships' Board held that Article 141 of the Act of 1877 (now reproduced in Article 141 of the Act, 1908) applied to the immoveable property, and that under it time ran from the death of the second widow, and that, therefore, the plaintiff in the suit was not barred by limitation. It was also held that Article 120 of the Act, 1877 (now reproduced in Article 120 of the Act, 1908), applied to the moveable property, and that the right of the plaintiff in the suit to sue under that article only accrued on the death of the second widow, and was, therefore, also not barred.

The case of *Vaithialinga Mudaliar* v. *Srirangath Anni*[5] illustrates the application of the rule in the *Shivagunga case,*[2] where a decree founded upon adverse possession has been obtained against a Hindu widow in her lifetime. The decision is not, in their Lordships' judgment, in conflict with that in *Runchordas Vandrawandas* v. *Parvatibhai,*[4] in which no decree had

2 (1863) 9 M.I.A. 539

4. (1899) L.R. 26 I.A. 71.

5. (1925) L.R. 52 I.A. 322: I.L.R. 48 M. 883: 49 M.L.J. 769 (P.C.).

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been obtained against the widow, nor had there been any other act in the law in the lifetime of the widow destroying the heir's interest.

In their Lordships' judgment, therefore, the appeal succeeds, with the result that the decree of the High Court ought to be discharged and the decree of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly. The defendant must pay to the plaintiff the costs of the appeal to the High Court and the costs of the appeal to His Majesty in Council.

Solicitors for appellant: *Summerhays, Son & Barber.*

Solicitors for respondent: *T. L. Wilson & Co.*

K.J R. *Appeal allowed.*

Reporter's Note—The judgment of the High Court in the above case was delivered eight months after the pronouncement of the Privy Council in *Vaithialinga Mudaliar* v *Srirangath Anni*, (1925) L.R 52 I A 322: I L R. 48 M 883: 49 M.L.J. 769 (P C.), but as the learned Judges cite no authorities it is not possible to say whether the Privy Council case was brought to their attention. It appears, however, from the passage in their Lordships' judgment, cited in the above report (beginning "It is now well established"), that the learned Judges had *Vaithialinga Mudaliar's case* before them and were apparently influenced by it in coming to their conclusions The appeal in the High Court was argued by eminent Counsel on both sides, and it is not likely that the then recent pronouncement of the Judicial Committee could have escaped their vigilance.—*K J.R*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD DARLING, LORD TOMLIN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

Kunwar Muhammad Abdul Jalil Khan and others .. *Appellants**

v.

Khan Bahadur Muhammad Obaid Ullah Khan and others .. *Respondents.*

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Civil Procedure Code (V of 1908), S 66—Real purchaser allowed to be in adverse possession but subsequently dispossessed by certified purchaser—Suit for possession by—Maintainability—Adverse possession of real purchaser for statutory period—Adverse possession by him for less than statutory period—Distinction—Scope of section—Transferee from certified purchaser under transfer made while Code of 1882 in force—Suit against—Applicability of S. 66 to case of.

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*P.C. Appeal No. 82 of 1924 17th June, 1929

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While S 66 protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it

Where the real purchasers have been allowed by the certified purchaser to remain in adverse possession for more than 12 years and are subsequently dispossessed by him, they are entitled to sue for possession on the title so acquired under the Limitation Act To such a case the provisions of S 66 of the present Code and the corresponding sections of the earlier Codes have no application

A suit based on dispossession after 12 years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*.

Quaere. Whether the provisions of S 66 and the corresponding sections of the earlier Codes apply to a suit for possession by the real purchasers who have been in adverse possession for less than the statutory period and are dispossessed by the certified purchaser within that period

That must depend upon the question whether the real purchaser is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section In a case in which the true owner has been in possession for less than 12 years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf

Quaere: Whether the provisions of S. 66, in so far as they prohibit suits on the ground specified in the section, apply to suits against transferees from *benamidars* made when S 317 of Civil Procedure Code of 1882 was in force.

Appeal No. 82 of 1924 from the High Court of Judicature at Allahabad.

A. M. Dunne and *W. Wallach* for appellants.

L. de Gruyther and *E. B. Raikes* for respondents.

17th June, 1929. The judgment of their Lordships was delivered by

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SIR JOHN WALLIS.—The parties to this suit are members of a Mahomedan family, and the plaintiffs sue to establish their rights as heirs of Abdul Shakur and Abdul Latif to certain properties in the villages of Chakathal and Kakathal, which are in possession of Obaid Ullah, the 1st defendant.

The deceased Abdul Shakur was the youngest of four brothers, Abdul Latif was the son of the eldest brother and Obaid Ullah is the son of a younger brother. The second and third defendants are widows who have been made parties as being among the heirs of Abdul Latif. The present appeal relates only to certain properties in the aforesaid villages, which were

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purchased at Court auctions in execution of decrees by Mahmud Ali on the 20th April, 1885, and by Sirajul Haq on the 21st of March, 1892. On the 7th and 8th July, 1900, Sirajul Haq and Mahmud Ali executed sale-deeds of these properties in favour of Obaid Ullah, the 1st defendant.

The plaintiffs' case is that the purchases at the Court auctions and the subsequent transfers were made *benami* for Abdul Shakur and Abdul Latif, who had provided the purchase money.

The plaintiffs further alleged that Abdul Latif, who died in 1909, and Abdul Shakur, who died in 1915, and the plaintiffs after them, had been in proprietary possession of these properties ever since the date of the Court auctions, and that by virtue of their possession for more than twelve years the plaintiffs had become absolute owners in possession of the properties in question.

It was admitted in the plaint that Abdul Latif, in April, 1909, some months before his death, had executed a *wakfnama* of all his properties, but it was alleged that this *wakfnama* was a mere paper transaction, and was not binding on the plaintiffs.

The plaint also alleged that after the deaths of Abdul Latif and Abdul Shakur, the 1st defendant, in September, 1915, instituted suits for arrears of rent against tenants of the properties, and in May, 1916, instituted a suit for profits, which jeopardised the plaintiffs' rights, and made it necessary to institute the present suit.

They accordingly prayed for a declaration that they were the actual owners in possession of the suit properties, and for an injunction against the 1st defendant. The plaint was subsequently amended by including a prayer for possession in case the Court should be of opinion that the plaintiffs were not in possession.

The 1st defendant pleaded that as regards the properties purchased at Court auctions in the name of Sirajul Haq and Mahmud Ali, the suit was barred by section 66 of the Civil Procedure Code of 1908 He denied that the auction purchase was *benami*, and alleged that he and his transferors had all along been in possession. As regards the *wakf* created by Abdul Latif, the 1st defendant admitted the execution of the deed of *wakf*, and that he had attested it, and alleged that after the death of Abdul Latif he had been duly appointed *mutawalli* or trustee of the *wakf*, but he alleged that he was then unaware that the *wakf* deed included properties of his own which had

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been purchased by Sirajul Haq and Mahmud Ali at the Court auctions, and subsequently transferred to him. He further pleaded that the plaintiffs were not entitled to sue in respect of the properties owned by the *wakf* unless the deed of *wakf* was cancelled.

The 2nd and 3rd defendants filed written statements in which they challenged the validity of the *wakf* and prayed that their interest as heirs of Abdul Latif should be protected. The issues material to this appeal were as follows:—

(3) Whether the plaintiffs are in possession?

(4) Whether the claim is time barred?

(5) Whether the plaintiffs by adverse possession extending over 12 years have become the proprietors of the properties in suit?

(6) Whether section 66 of the Civil Procedure Code bars the suit?

(7) Whether purchases and acquisitions made by Sirajul Haq and Mahmud Ali Khan were really made by Abdul Latif Khan and Abdul Shakur Khan?

(8) Whether the sales in favour of the Defendant No. 1 were fictitious and the transactions were *benami* for Abdul Latif and Abdul Shakur?

(11) Whether the *wakfnama* executed by Abdul Latif was a genuine transaction or was it only a nominal one?

As regards issues (3) and (4) the Subordinate Judge, whose findings of fact were accepted by the High Court, found that plaintiffs were not in possession at the date of suit, but that they and those through whom they claimed had been in possession, "physical possession at any rate," down to the death of Abdul Shakur in 1915.

On the 6th, 7th and 8th issues, he found that the purchases and acquisitions made by Sirajul Haq and Mahmud Ali were really made by Abdul Latif and Abdul Shakur and that the sales by Sirajul Haq and Mahmud Ali to the 1st defendant were also *benami* for Abdul Latif and Abdul Shakur, but as regards the properties covered by the auction purchases, he held the suit was barred by section 66 of the Civil Procedure Code.

As regards the 5th issue the Subordinate Judge disposed of it by observing "the plaintiffs have pleaded in the alternative that if they had no title initially they acquired one by adverse possession. The finding of the Court being that in respect of the

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bulk of the property the owners were Shakur and Latif, no question of gain of proprietary title by adverse possession arises."

The Subordinate Judge also held that the *wakf* created by Abdul Latif was a good and valid one, but that this was not a sufficient ground for refusing to give possession to the rightful heirs of the founder as the 1st defendant had taken possession of the *wakf* properties not as a duly appointed *mutawalli*, but as a mere trespasser.

In the result he decreed the suit except as to the properties which had been purchased *benami* at the Court auctions, and directed that as regards any questions arising between the heirs of Abdul Shakur and Abdul Latif the parties should be referred to a separate suit.

The plaintiffs appealed to the High Court and the 1st defendant filed cross-objections.

The High Court agreed with the findings of fact of the Subordinate Judge and approved of his reasons for holding that the suit was barred as regards the properties covered by the auction purchases. They held, however, that he was wrong in giving the plaintiffs a decree in respect of properties which were included in the *wakf* created by Abdul Latif, as the gift of those properties to the *wakf* had been duly perfected by Abdul Latif in accordance with the requirements of ~medan Law, and as, after his death, the 1st defendant had been duly appointed *mutawalli* of the *wakf*.

They therefore dismissed the plaintiffs' appeal and allowed the 1st defendant's cross-objections as to the *wakf* properties.

As regards the properties which, according to the findings, were purchased at Court auctions by Sirajul Haq and Mahmud Ali *benami* for Abdul Shakur and Abdul Latif, and were subsequently transferred to the 1st defendant, Obaid Ullah *benami* for them, both the Lower Courts were of opinion that the suit was barred under section 66 of the Civil Procedure Code of 1908 on the ground that it was a suit against a "person claiming title under a purchase certified by the Court. . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.'' The present section says that "no suit shall be maintained against any person claiming title under a purchase certified by the Court," whereas the wording of the corresponding section 317 of the Code of 1882 was "no suit shall be maintained against the certi-

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fied purchaser," and the alteration was admittedly made because it had been held by the Calcutta, Madras and Allahabad Courts that the section only prohibited suits of this nature instituted against the certified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. In these circumstances, it has been held in Calcutta that the provisions of section 66 of the present Code in so far as they prohibit suits on the ground specified in the section, do not apply to suits against transferees from *benamidars* made when section 317 of the Code of 1882 was in force, and it has been contended before their Lordship on the authority of that decision that the Lower Courts wer wrong in applying the provisions of section 66 of the Code of 1908 to the present case.

Their Lordships do not propose to deal with this question, because, in their opinion, assuming the Courts to have been right in holding that the case must be dealt with under the provisions of section 66 of the present Code, they are of opinion that the plaintiffs are entitled to succeed on their alternative cause of action, which is the subject of the 5th issue, *viz.*, their dispossession by the 1st defendant after they had been in possession for more than twelve years, a contention very briefly dealt with by the Subordinate Judge and not mentioned by the High Court, though it was one of the grounds of appeal and was taken again in the application for leave to appeal to His Majesty in Council.

In dealing with these questions their Lordships think it desirable in the first place to refer to *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall and Jokhee Lall,*[1] a decision of this Board on the corresponding section of the Code of 1859, which is the leading authority as to the scope of the section. It was held in that case that the effect of the section was not to make these *benami* transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section; and in *Lokhee Narain Roy Chowdhry* v *Kalypuddo Bandopadhya*[2] it was expressly ruled by this Board, following that decision, that where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, is not precluded by the section from showing the real nature of the transaction.

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1 (1872) 14 M I.A. 496

2 (1875) L R. 2 I.A. 154.

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Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section. In such a case, if the true owner has been in possession for less than twelve years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf.

In their Lordships' opinion the provisions of section 66 of the Code of Civil Procedure and the corresponding sections of the earlier Codes have no application to such a case.

A suit based on dispossession after twelve years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*.

The plaintiffs are therefore entitled to succeed as regards the properties which were included in the auction purchases, except in so far as they are included in the *wakf* created by Abdul Latif in 1909. It has been found by both Courts that the gift to the *wakf* was duly perfected according to the rlues of Mahomedan Law and by the High Court, that the 1st defendant was duly appointed *mutawalli* or trustee of the *wakf*

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after the founder's death and the plaintiffs' claim to the *wakf* properties has therefore been rightly disallowed.

In these circumstances the appeal must be allowed and the decrees of the Lower Courts varied by giving the plaintiffs a decree for the properties covered by the auction purchases and not included in the *wakf*, but in the circumstances their Lordships are of opinion that the plaintiffs should only recover half their costs in the Courts below and here, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Hy. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD CARSON, SIR LANCELOT SANDERSON AND SIR BINOD MITTER

Maharaj Bahadur Singh and others .. *Appellants**

v.

A. H. Forbes .. *Respondent.*

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Maharaj Bahadur Singh *v.* A. H. Forbes.

Civil Procedure Code (V of 1908), S 48—Execution application—Continuation of prior one, or fresh application—Rent decree against dar-patnidar—First application for execution of, on footing that decree created a charge on tenure—Three subsequent applications on footing that decree was a mere money decree—Fifth application on footing that decree created a charge on tenure—Fifth if a continuation of first

D, who had been the Zamindar of Lot *S,* but who had sold his Zamindari on 27th June, 1893, instituted a suit against the patnidar on 21st September, 1893 for arrears of rent due to him up to 27th June, 1893, and obtained a decree which became final on 10th July, 1896 The question for decision was whether an application presented on 2nd December, 1922 for execution of that decree was a continuation of a prior execution application, dated 9th May, 1908 or was a fresh application within the meaning of S. 48 of the Code The appellants were the successors in interest of *D,* and the respondent was a dar-patnidar.

The application of 2nd December, 1922 asked for process against the respondent for the sale of the *patni* mahal. The application of 9th May, 1908 also proceeded on the footing that the decree created a charge on the tenure. There were three applications for execution between these, and in all three of them the decree-holders gave up the position that their decree created any charge on the tenure, treated it as being merely a money decree, and attempted to execute it against properties other than the patni tenure.

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Held, that the application of 2nd December, 1922 was not a continuation of that of 9th May, 1908 but was a fresh application within the meaning of S. 48 of Civil Procedure Code, and that the execution of the decree was, therefore, barred by limitation

The three intervening applications were essentially different in character from the application of 9th May, 1908, and their Lordships are inclined to the view that the decree-holders had abandoned the application of 9th May, 1908, but in any event they are clearly of opinion that the combined effect of those previous applications marks such substantial departure from the original application of 9th May, 1908, as to make it impossible to hold that the application of 2nd December, 1922 was a continuation of the application of 9th May, 1908.

Appeal No. 60 of 1927 from the High Court of Judicature at Patna.

E. B. Raikes and *M. Majid* for appellants.

B. Dube for respondent.

11th June, 1929. The judgment of their Lordships was delivered by

Sir Binod Mitter.

SIR BINOD MITTER.—This is an appeal against the decision of the High Court of Patna, dated 29th March, 1926, affirming the decision of the District Judge of Purneah, whereby it was held that a decree obtained by Dhanpat Sing, dated 10th July, 1896, cannot be executed against the respondent.

Dhanpat Sing was the Zamindar of Lot Saifganj in Pargana Haveli, in the District of Purneah, and Chatterpat Sing was the holder of the *patni* of the said lot. He settled the same in several parcels with various *dar-patnidars* amongst others with the father of the present respondent. Dhanpat sold his Zamindari to Bhagwanbati on the 27th June, 1893.

Dhanpat instituted a suit against the *patnidar* Chatterpat Sing on 21st September, 1893, for arrears of rent due to him up to 27th June, 1893, and obtained a decree which became final on 10th July, 1896.

On 19th July, 1896, Dhanpat executed a deed of trust in favour of several trustees for the benefit of his son Maharaj Bahadur Singh (and they are hereinafter referred to as appellants or decree-holders) of several properties, including amongst others the decree of 10th July, 1896. Dhanpat died on the 21st July, 1896.

Chatterpat again defaulted in the payment of rent of the *putni* and on 14th May, 1900, Bhagwanbati, the purchaser, put up the *putni* for sale for arrears of rent for a period subsequent to her purchase. Mr. Forbes paid the arrears due to Bhagwan-

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bati, amounting to Rs. 6,562-8-0, for the protection of his *dar-putni* tenure, and by such payment became a mortgagee of the entire *putni* under section 13, sub-section (4) of the Putni Regulation, and he was put into possession of the same under the same section.

In execution of a money decree the right, title and interest of Chatterpat in the *putni* tenure was sold on the 1st September, 1902, and one Surendra Narayan Sing purchased the same and obtained symbolical possession of the *putni* on the 18th May, 1902, although Mr. Forbes continued to be in actual possession.

Thereafter there was litigation between the decree-holders and Surendra. The latter alleged that the decree was a money decree, but it was ultimately held between them that the decree was a rent decree creating a charge on the *putni* tenure under section 65 of the Bengal Tenancy Act.

The decree-holders applied on 9th May, 1908, for execution of that decree against the judgment-debtor and the execution case was numbered 11 of 1908. The *putni* was attached and sold in execution of the said decree, but the sale was ultimately set aside on 16th February, 1911.

Mr. Forbes on the 9th July, 1906, instituted a suit against the decree-holders and Surendra for a declaration that the decree was a mere money decree, and on the 9th March, 1914, it was ultimately held by their Lordships of the Judicial Committee that the decree of 10th July, 1906, was not a decree for rent under section 65 of the Bengal Tenancy Act, creating a charge on the tenure, but only a money decree, and that the respondent in this appeal had a charge under the Putni Regulation, and in any event this charge was not affected by any charge under the Bengal Tenancy Act. Their Lordships further held that the appellants were not entitled to execute the decree against the *putni* and they were restrained by a perpetual injunction from doing so. (See *Arthur Henry Forbes* v. *Maharaj Bahadur Singh*[1].)

In the meantime a suit numbered 240 of 1910 had been instituted by Surendra against the respondent Forbes for accounts to which the decree-holders, that is, Maharaj Bahadur and others, were not made parties.

In that last-mentioned suit a final decree for the sale of the *putni* was made under O. 34, R. 5, in favour of the respond-

1. (1914) L.R. 41 I.A. 91. I.L.R. 41 C 926. 27 M.L.J. 4 (P.C.).

ent on 8th January, 1917, and the property was sold at the instance of the respondent and purchased by the latter on 4th August, 1917, for the sum of Rs. 2,000.

The appellants, the present decree-holders, on 22nd January, 1915, and on dates subsequent thereto, made various applications for execution of the decree against the judgment-debtor and Surendra and the respondent. The last application was on 2nd December, 1922. The details of such applications will be discussed later on.

The application of 2nd December, 1922, was against the respondent and asked for process against him for the sale of the *putni* mahal. This application was dismissed by the trial Judge on 16th April, 1924, on the ground that the respondent was not a representative of the judgment-debtor and that the decree could not be executed against him. The trial Judge further held that the application of 2nd December, 1922, was not a continuation of the application of 9th May, 1908, but was a fresh application within the meaning of section 48 of the Civil Procedure Code and was barred by the law of limitation.

The decree-holders appealed to the High Court of Judicature at Patna, and Mr. Justice Das, one of the Judges, dismissed it, holding that, although the respondent as purchaser must be regarded as the representative of the mortgagor, he must also be considered as the representative-in-interest of the mortgagee and that the charge of the mortgagee is not extinguished in the hands of the respondent as purchaser of the property. He did not in that view express any opinion upon the other questions raised in the appeal. Mr. Justice Foster, the other Judge, held that by reason of the decision of the Judicial Committee in 1914 there was *res judicata* not only between the appellants and the respondent but also between the present appellants and Surendra, and he further held that the decree was barred by limitation The present appeal is against the last-mentioned decision.

The appellants in the present appeal contended, firstly, that the application of 2nd December, 1922, was a continuation of the execution proceedings initiated by their application of 9th May, 1908; secondly, that as it had been held that the decree created a charge on the *putni* against Surendra and as the respondent merely purchased the equity of redemption from Surendra, the decree-holders must be deemed to be in the position of a second mortgagee of the *putni* and were entitled to sell the

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equity of redemption in the hands of the respondent, but they conceded that if the respondent insisted, then they would have to redeem the respondent; and thirdly, that Mr. Justice Foster was wrong on the question of *res judicata*. Mr. Dube, for the respondent, disputed all these contentions.

Their Lordships will now refer to the various applications for execution in some detail.

On 22nd January, 1915, the decree-holders applied for execution of the decree of 10th July, 1896, whereby they prayed that the rent decree might be converted into a money decree and that Surendra be made one of the judgment-debtors and they be allowed to take further proceedings in the execution case.

Surendra, on 27th March, 1915, alleged that he was not a representative of the judgment-debtor's interest in the *putni*, and that the same had been extinguished by his purchase and that the decree was barred by limitation.

On the 19th March, 1917, the decree-holders on the footing of the decree being merely a money decree, applied for attachment of other properties belonging to Chatterpat Sing. Before this application was disposed of and on 4th August, 1917, the respondent, as has already been stated, had purchased the *putni* mahal in execution of his decree.

On 23rd November, 1918, the decree-holders, again on the footing of the decree being a money decree, applied for and obtained an order that certain personal properties of Surendra might be attached and sold and from such sale proceeds their claim be satisfied. On Surendra's application his properties were ordered to be released.

The decree-holders appealed against the order releasing Surendra's personal properties, and the appeal was dismissed on 24th March, 1922. In dismissing the appeal, Mr. Justice Das said that, in his opinion, it was open to the decree-holders to proceed against the *putni* tenure in the hands of the respondent. This observation of the learned Judge was unnecessary for the purposes of his decision and was in no way binding on the respondent, who had not been made a party to the aforesaid proceedings.

In the view that their Lordships take of limitation, it is unnecessary to decide any other questions involved in the appeal, and accordingly their Lordships express no opinion whatsoever on any of the other points decided by the High Court.

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Their Lordships observe that, after the decision of the Judicial Committee in 1914, the decree-holders by their application of 22nd January, 1915, gave up the position that their decree created any charge on the tenure, and in all their subsequent applications they attempted to execute the decree against properties other than the *putni* tenure. They observe that on 19th March, 1917, the decree-holders, in their application against Chatterpat, applied for process against properties other than the *putni*, and again on 23rd November they applied against Surendra for attachment and sale of properties other than the *putni*. This course the decree-holders persistently took till the observation of Mr. Justice Das on 24th March, 1922, to the effect that it was open to them to proceed against the *putni* tenure in the hands of the respondent.

Their Lordships have no doubt that the applications of 22nd January, 1915, 19th March, 1917, and 23rd November, 1918, were essentially different in character from the application of 9th May, 1908, and they are inclined to the view that the decree-holders had abandoned the application of 9th May, 1908, which proceeded on the footing that their decree created a charge on the tenure, but in any event they are clearly of opinion that the combined effect of these previous applications marks such substantial departure from the original application of 9th May, 1908, as to make it impossible to hold that the application of 2nd December, 1922, was a continuation of the application of 9th May, 1908.

Their Lordships are, therefore, clearly of opinion that the application of 2nd December, 1922, was a fresh application within the meaning of section 48 of the Civil Procedure Code and that the execution of the decree of 10th July, 1896, is barred by limitation.

They accordingly will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Francis & Harker.*

Solicitors for respondent: *Watkins & Hunter.*

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE RAMESAM, MR. JUSTICE ODGERS, MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MACKAY.

P. M. A. Velliappa Chettiar and another .. *Appellants**

v.

Saha Govinda Doss and others .. *Respondents.*

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Velliappa Chettiar *v.* Saha Govinda Doss.

Letters Patent (Madras), cl. (12)—Suit for land—Lands situate outside Madras—Contract to sell made in Madras—Parties resident in Madras—Suit by purchaser for specific performance—If a suit for land

A suit by a purchaser of lands situate outside Madras for specific performance of a contract to sell made in Madras by parties resident therein is not a "suit for land" within the meaning of clause (12) of the Letters Patent.

On appeal from the judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated 2nd February, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 12 of 1921.

T. M. Krishnaswami Aiyar and *M. Subbaroya Aiyar* for 2nd appellant.

K. S. Krishnaswami Aiyangar, T. N. C. Srinivasachariar and *T. Ramachandra Rao* for respondents.

The Court (The Chief Justice and Madhavan Nair, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—We think that before a decision can be given on this matter a question must be disposed of by a Full Bench having regard to the Indian authorities and that question is this:

"Is a suit by a purchaser of land situate outside Madras for specific performance of a contract to sell made in Madras by parties resident therein, a suit for land within the meaning of clause (12) of the Letters Patent, and so not cognizable by the High Court in its Ordinary Original Civil Jurisdiction?"

If English Law applied, it is quite clear that the Madras High Court would have jurisdiction, and that is not disputed.

It is said that the words in the Letters Patent make the position different under Indian Law.

All the authorities are considered in the judgment of the learned trial Judge and we do not think it would assist the Full Bench to review them again.

It is clearly necessary that an authoritative ruling on this point should be laid down by this Court.

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*O.S.A. No 95 of 1926. 12th October, 1928.

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T. M. Krishnaswami Aiyar (with him *M. Subbaroya Aiyar* and *T. V. Viswanatha Aiyar*) for appellants.—The question is whether the High Court can entertain a suit for specific performance of a contract made in Madras to sell land situate outside Madras (in Chittoor) when the defendants reside within its jurisdiction. Defendants 1 and 2 contracted to sell land. The other defendants are purchasers with notice. I contend that the High Court has jurisdiction since the contract was made and the defendants reside in Madras. Cl. (12) does not exclude the suit from the High Court's jurisdiction on the Original Side. It is not "suit for land" as contemplated by cl. (12). A suit for specific performance is an action *in personam*.

The English Law is the basis of the Indian Law. The action is one *in personam* and one that falls within the equitable jurisdiction. The Supreme Court which was established in 1801 was a Court of Record and a Court of Equity. *See* Morley's Digest, Vol. II, p. 588 at 614, para. 31 Ss. 8 and 9 of the Charter Act provide that the High Court is to have all the jurisdiction of all the Courts abolished by that Act.

Counsel then read clauses (11), (12) and (19) of the Letters Patent and proceeded to explain the meaning of the term "suit for land." It has been held that a suit for administration of an estate is not a suit for land—vide *Krishnadoss Vithaldoss* v. *Ghanshamdoss and Narayandoss*,[1] which is the case of a trustee administering lands situate outside Madras. To constitute a suit for land title to land must be directly affected. That is the test of a suit for land. There is no direct case of the Madras High Court under clause (12) to cover the present case. *Yashvantrav Holkar* v. *Dadabhai Cursetji*[2] held that a suit for specific performance of a contract of mortgage was not a suit for land. *India Spinning and Weaving Co., Ltd.* v. *Climax Industrial Syndicate*[3] held that *Yashvantrav Holkar* v. *Dadabhai Cursetji*[2] was wrong. But *Hatimbhai Hassanally* v. *Framroz Eduljee*[4] held that *Yashvantrav Holkar* v. *Dadabhai Cursetji*[2] was right. *Hunsraj Morarjee* v. *Runchordas Dharsey*[5] is also in my favour. Counsel then cited *The Delhi and London Bank* v. *Wordie*,[6] *Kellie* v. *Fraser*[7] and *Sreenath Roy* v. *Cally Doss Ghose*.[8]

1 (1924) 49 M.L.J. 311
2 (1890) I.L.R. 14 B 353 at 358
3 (1925) I.L.R. 50 B 1 (F.B.)
4 (1927) I.L.R. 51 B. 516 (F.B.)
5 (1905) 7 Bom L.R. 319
6. (1876) I.L.R. 1 C 249.
7 (1877) I.L.R. 2 C 445.
8 (1879) I.L.R. 5 C. 82.

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Ratanchand Dharamchand v *Gobind Lall Dutt*[9] is based on *Sreenath Roy* v. *Cally Doss Ghose.*[8] *Juggodumba Dossee* v. *Puddomoney Dossee*[10] approves of the ruling in *Ramdhone Shaw* v. *Nobumoncy Dossee.*[11] That is the earliest case and it is in my favour *Juggernauth Doss* v *Brijnath Doss*[12] held that a suit to recover title deeds to immoveable property was not a suit for land. *Land Mortgage Bank* v. *Sudurudeen Ahmed*[13] held that a suit by a vendor for specific performance was not a suit for land. This has been approved of in a later case in *Nagendra Nath Chowdhury* v. *Eraligool Co., Ltd.*[14] *See* also *Kanti Chunder Pal Choudhry* v. *Kissory Mohun Roy.*[15]

K. S. Krishnaswami Aiyangar (with him *T. N. C. Srinivasachariar* and *T. Ramachandra Rao*) for respondents.—The term "suit for land" must be construed without reference to the principles of equity. All the Judges in the Bombay Full Bench case *Hatimbhai Hassanally* v. *Framroz Eduljee*[4] exclude consideration of equity As regards what is "a suit for land," there are three views:

(1) Suit for recovery of possession of land, that is the narrowest construction. That prevailed in Bombay at first. See *Yenkoba Balshet Kasar* v. *Rambhaji valad Arjun.*[16] But that has now been rejected even by the Bombay High Court.

(2) Suit relating to land either directly or indirectly or remotely and incidentally, that is the other extreme. I do not go so far.

(3) The middle view, that is, a suit for the acquisition of title to or control over land. *The Delhi and London Bank* v. *Wordie.*[6] I adopt the view which has been upheld by all the High Courts

Krishnadoss Vithaldoss v. *Ghanshamdoss and Narayanadoss*[1] rejects the first view. A suit in which the relief results in the plaintiffs getting a title to land is a suit for land. The present case is one of this category.

[*Ramesam, J.*—No. If the plaintiff gets a decree for specific performance he does not get any title, but only a right to get a title to land.]

Almost all the cases go to the length of saying that the term means something more than a mere suit for recovery

1 (1924) 49 M.L J. 311.
4 (1927) I.L.R 51 B. 516 (F B.).
6 (1876) I.L.R. 1 C. 249 at 263.
8 (1879) I.L.R. 5 C. 82.
9 (1921) I L R. 48 C. 882.
10 (1875) 15 Beng. L R. 318
11 (1865) Bourke's Reports, p 218.
12 (1878) I.L R 4 C 322.
13 (1892) I.L R 19 C 358 at 361.
14 (1922) I.L.R. 49 C 670.
15 (1887) I L R 19 C 361-N.
16 (1872) 9 Bom. H.C.R. 12.

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of land and I contend that a suit for specific performance of an agreement to sell land is certainly a suit for land. A suit relating to mortgage is one class. Another class is that in which the decree incidentally affects the title to land. The latter has been held to be not a suit for land, *i.e.*, a suit for partnership accounts, administration of trusts, etc. The primary object to the suit must be considered. If the primary object is title to land, then it is a suit for land; but if the object is only money, then though land has to be sold, it is not a suit for land.

Counsel then cited *Nalum Lakshimikantham* v. *Krishnaswami Mudaliar,*[17] *Sundara Bai Sahiba* v. *Tirumal Rao Sahib,*[18] *The Official Assignee of Madras* v. *Ramaswami Aiyangar,*[19] *Srinivasa Aiyangar* v. *Cunniappa Chetti,*[20] *Srinivasa Aiyangar* v. *Kannappa Chetti,*[21] *Vaghoji* v. *Camaji*[22] and *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi.*[23]

A suit for recovery of title deed has been held to be a suit for land. *Zulekabai* v. *Ebrahim Haji Vyedina.*[24] But Calcutta takes a contrary view. See *Juggernauth Doss* v. *Brijnath Doss.*[12] A suit for maintenance as charge upon land, *Yeshvadabai* v *Janardhan Raghunath Warik,*[25] *Bibee Jaun* v. *Meersa Mahommed Hadee*[26] (Case of foreclosure suit) and *In the matter of the Petition of S. J. Leslie*[27] (Suit for sale).

These were held to be suits for land. Then with regard to specific performance cases, a suit by a purchaser is a suit for land, while a suit by a vendor for purchase money is not. This distinction is well marked and maintained throughout in the Calcutta cases. See *Sreenath Roy* v. *Cally Doss Ghose,*[8] *Ratanchand Dharamchand* v. *Gobind Lall Dutt*[9] as to mortgagee's suits. *Land Mortgage Bank* v. *Sudurudeen Ahmed*[13] is a case of vendor's suit for purchase money. The distinction is indicated in this case. Counsel then referred to *Nagendra Nath Chowdhury* v. *Eraligool Company, Ltd.*[14] and *Hunsraj Morarjee* v. *Runchordas Dharsey.*[5]

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5 (1905) 7 Bom L.R. 319 8 (1879) I.L.R. 5 C. 82
9 (1921) I.L.R. 48 C. 882. 12 (1878) I L.R. 4 C. 322.
13. (1892) I L.R. 19 C 358 14. (1922) I.L.R. 49 C 670.
17 (1903) I.L.R. 27 M. 157
18. (1909) I.L.R. 33 M 131: 20 M L.J. 103
19 (1912) 23 M.L.J. 726 20 (1914) 26 M.L.J. 567.
21. (1915) 30 M.L.J. 120. on appeal from 26 M.L.J. 567.
22 (1904) I.L.R. 29 B. 249.
23 (1914) L R. 41 I.A. 110· I.L.R. 41 C 972 27 M.L.J. 80 (P.C).
24 (1912) I.L R. 37 B. 494 25 (1923) 25 Bom L.R. 1172.
26. 1 Ind Jurist (N.S.) 40. 27. (1872) 9 Beng. L.R. 171.

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T. M. Krishnaswami Aiyar in reply explained *Vaghoji Kuverji* v. *Camaji Bomanji*,[22] *Sudamdih Coal Co., Ltd.* v. *Empire Coal Co., Ltd.*[28] and *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi.*[23] *Vaghoji Kuverji* v. *Camaji Bomanji*[22] refers to the equitable principles of English Law. The distinction between Common Law Courts and Equity Courts is seen in *British South Africa Co.* v. *Companhia de Mocambique.*[29] Wherever the Common Law Courts did not grant relief the Equity Courts assumed jurisdiction. The principle is accepted both in *Vaghoji Kuverji* v. *Camaji Bomanji*[22] and *Sudamdih Coal Co., Ltd.* v. *Empire Coal Co., Ltd.*[28] The term "suit for land" must be given only the limited construction I contend for. *Sundara Bai Sahiba* v. *Tirumal Rao Sahib*[18] is bad law. *Nalum Lakshimikantham* v. *Krishnaswami Mudaliar*[17] case of a mortgage action is not relevant. A specific performance suit stands entirely on a different footing. As regards jurisdiction it is not for one to show jurisdiction. The defendant must show want of jurisdiction. The effect of *The Official Assignee of Madras* v. *Ramaswami Aiyangar*[19] would be to delete clause (12) of the Letters Patent and insert section 16, Civil Procedure Code, instead. *Srinivasa Aiyangar* v. *Kannappa Chetti*[21] is only a case of a local action, a common law remedy. In *Krishnadoss Vithaldoss* v. *Ghanshamdoss Narayanadoss*[1] Srinivasa Aiyangar, J., does not apply the direct definition which he himself gives.

Hunsraj Morarji v. *Runchordas Dharsey*[5] and *Ramdhone Shaw* v. *Nobumoney Dossee*[11] are direct cases of purchases and the latter has not been dissented from. In *Nagendra Nath Chowdhury* v. *Eraligool Co., Ltd.*[14] it was wrongly assumed that a purchaser's action had been decided whereas in fact it was not so. The cases of mortgagees are entirely different. In a suit for land the plaintiff must be seeking to obtain a declaration regarding title to land. Equity jurisdiction has been conferred on the High Court. That is not cut down by the Letters Patent in actions *in personam* of which a suit for specific performance is one.

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1. (1924) 49 M.L.J. 311. 5 (1905) 7 Bom. L.R. 319
11. (1865) 1 Bourke's Reports, p. 218. 14. (1922) I.L.R. 49 C. 670.
17. (1903) I.L.R. 27 M. 157
18 (1909) I.L.R. 33 M. 131: 20 M L.J. 103
19 (1912) 23 M.L.J. 726. 21. (1915) 30 M.L.J. 120.
22 (1904) I.L.R. 29 B. 249.
23 (1914) L R. 41 I A. 110 I L.R. 41 C. 972· 27 M.L.J. 80 (P C.).
28. (1915) I.L.R. 42 C. 942. 29. (1893) A.C. 602.

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Coutts Trotter, C. J.

The Court expressed the following

OPINION. *The Chief Justice.*—I have had the advantage of reading the judgment about to be pronounced by my brother Ramesam, and I entirely concur in it. I only add a few words of my own in order to bring out certain points which he has made with which I find myself in specific and emphatic agreement.

The first is that our opinion is directed to a concrete and isolated case, that of a suit by a purchaser of land for specific performance against his vendor of the contract for the sale of land entered into by his vendor; and is not to be considered as containing *in gremio* analogies which can be usefully applied to such subject-matters as vendors' suits for specific performance, suits on mortgages, suits for maintenance, suits for the wrongful removal of surface trees or subterranean coal. A number of decisions have been cited to us on these and kindred topics. Some of them I think to be wrong, others very doubtful, but of all of them it appears to me to be enough to say that [illegible] us and that our decision leaves future discussion on such questions entirely at large.

Secondly, I am satisfied that a phrase like "suit for land" can only be defined, if it has to be defined, by what logicians call "enumeration of categories," as Mackay, J., forcibly pointed out in the course of the argument. That is to say, that the legislature can only help us by setting out what it intends to be included in the term "suits for land" and what excluded; a method of legislation which has been pursued not unsuccessfully in the explanations and illustrations to many sections of Indian Acts. That has not been done here; and we are left to ourselves to fit the statutory words as best we can to each case as it comes before us. Such attempts as have been made to arrive at a definition on other lines have only resulted in prefixing an adverb to the words of the statute—the favourite one being "substantially" That seems to me merely to add an unnecessary task to our original one: the imponderable adverb "substantially" itself calls for a definition, a task more difficult in my opinion than the definition of the actual words of the Letters Patent. The truth is that many Indian statutes fall into one of two extremes. They sometimes throw at the Courts cryptic expressions without a word of explanation or illustration to show what was the real intention of the Legislature: and this is an instance. On the other hand, it sometimes passes Acts

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which are obviously intended to deal with every conceivable case that can arise—which means of course every case that was present to the mind of the draftsman. The Limitation Act offers a striking example of both. The Act with all its 31 sections and 183 articles has no specific article to deal with so obvious a case as that of a simple suit for debt. On the other hand into Article 183 it has introduced the term "revived" without a word of definition or explanation; the inevitable result has followed that the Indian Courts for half a century have been compelled to delve in venerable English reports to acquire learning about writs of *scire facias* and the like, a task which ought never to have been set them.

Finally, I wish to make it clear that my decision is not based on any consideration that specific relief was as a matter of history administered by Courts of Equity and not Courts of Common Law in England, or even that in its essence and nature it was an equitable and not a legal remedy. These considerations do not seem to me to go to the root of the matter for this country, for the simple reason that here the remedy, whatever its origin be, is prescribed by statute But I do not think that the statute overrides one fundamental juridical distinction, which obtains in every organized community in the world: *viz.*, that between decrees that affect the status of individuals, or bring about *proprio vigore* an immediate change in the ownership of property, and decrees which merely purport to compel the defendant to do or abstain from doing something which the Court orders. In the technical language of law, it is known as the distinction between actions *in rem* and actions *in personam;* but the distinction, I think, is not technical, but based as I have said on universally accepted juridical canons.

I therefore agree that our answer should be that this is not a suit for land.

Ramesam, J.

Ramesam, J.—This appeal arises out of a suit for specific performance of a contract whereby defendants 1 and 2 agreed to convey to the plaintiff for a consideration of Rs. 55,000 their right, title and interest in Konasamudram village in the Karvetnagar Zamindari and for other reliefs.

The third defendant is a mortgagee of the suit properties and it was alleged that he also agreed to convey to the plaintiff his right over the suit properties. Defendants 4 to 6 were impleaded as subsequent purchasers of the properties with notice of agreement in favour of the plaintiff. The suit was filed on

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the Original Side of the High Court. The village of Konasamudram is situated in the Chittoor District and is not within the limits of the ordinary original jurisdiction of the High Court. At the time of the trial a question was raised as to the jurisdiction of the Original Side to try the case. The jurisdiction of the Original Side turns upon the construction of clause (12) of the Letters Patent issued for the Madras High Court (28 and 29 Vic., Chapter XV). Clause (12) empowers the High Court

"to try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated or in all other cases if the cause of action shall have arisen, either wholly or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits"

It is admitted that defendants 1 to 3 were residents of Madras at the time of the institution of the suit. The learned trial Judge came to the conclusion that the present suit was a suit for land within the meaning of clause (12) of the Letters Patent and as the land is not situated within the limits of the ordinary original jurisdiction he held that the suit did not lie and dismissed it though he recorded also findings on other issues. The plaintiff filed this appeal, which has been referred to a Full Bench by my Lord the Chief Justice and Madhavan Nair, J., having regard to the Indian authorities.

There is a very large body of case-law on clause (12) of the Letters Patent and the construction of that clause has led to considerable diversity of opinion. There has been a conflict of opinion on the construction of the various parts of the clause and on their bearing on one another and also on the meaning of the expression "suits for land or other immovable property." I will first deal with the question whether the present suit should be regarded as a suit for land or other immovable property. If this question is answered in the negative, then on any view of the rest of the clause, the Original Side has jurisdiction to try the suit, for the defendants dwell or carry on business, or personally work for gain, within the limits of the ordinary original jurisdiction.

The case has been very exhaustively argued by the learned Advocates for the appellant and for the respondents and between them all the decisions of the Madras, Bombay and Calcutta High Courts bearing on clause (12) and the Privy Council decisions

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have been referred to and commented on before us. They range from *Ramdhone Shaw* v. *Nobumoney Dossee*[11] to *Goculdas* v. *Chaganlal*[30] decided last year (1927). An examination of these decisions shows that it is impossible to reconcile them even omitting those which expressly purport to differ from each other,—the attitude of the same Judge with reference to the expression "suit for land" sometimes varying according to the nature of the suit before him, the inclination being to give a wider meaning to the expression if it is a suit of one kind such as a suit on a mortgage and to give a narrower meaning if the suit is of a somewhat different category. In the case of other Judges the tendency has been to give the widest possible meaning to the expression. Under such circumstances it is obvious that any attempt to define the term "suit for land or other immoveable property" on any general principles, that is, in abstract terms only, without reference to concrete details, is bound to end in failure, and, however thoroughly one may analyse the discussion, the result is not likely to be more successful The very able and exhaustive judgments of Marten, C.J., and the other Judges in *Hatimbhai Hassanally* v *Framroz Eduljee*[4] illustrates this statement—a case heard by a Full Bench of seven Judges, two Judges dissenting in the final decision. I therefore prefer to take a different course of action in dealing with this case. I would eliminate those cases dealing with suits of a nature different from the one before me and would confine myself to suits for specific performance only. For instance, I would not discuss cases relating to suits on mortgages. A suit for redemption may easily be considered as a suit for land. A suit for foreclosure, though the primary object is to recover money, may also be described as a suit for land as there is a prayer for recovery of land by reason of the foreclosure, but greater difficulty arises if it is a suit for sale; though the Court may have to sell the land, what the plaintiff recovers is always money and it is difficult to describe the suit as one for land; and yet after the definition of 'mortgage' in the Transfer of Property Act, one may say that every mortgage is a transfer of an interest in immovable property and an action on a mortgage, even where its object is to recover money by sale, is really a mode of reducing that interest in immovable property to enjoyment. I do not propose to consider which is the correct view as between these two conflicting views The early decision of the Madras High Court in *Nalum Lakshimi-*

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4 (1927) I L R 51 B. 516 (F B.). 11 (1865) 1 Bourke's Reports, p 218
30 (1927) I.L.R 54 C 655

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kantham v. *Krishnaswami Mudaliar*[17] and the decisions in *India Spinning and Weaving Co., Ltd.* v. *Climax Industrial Syndicate*[3] and *Hatimbhai Hassanally* v. *Framroz Eduljee*[4] and the case in *In the matter of the Petition of S. J. Leslie*[27] need not therefore be considered. Similarly the decision in *Juggodumba Dossee* v. *Puddomoney Dossee*,[10] where the suit related to a trust and the plaintiffs, alleging that the defendant committed breaches of trust, prayed for the establishment of their right as joint trustees and for the settlement of a scheme, does not come in for discussion here. So also *The Delhi and London Bank* v. *Wordie*,[6] *Goculdas* v. *Chaganlal*[30] and *Krishnadoss* v. *Chandavandos*.[1] In the case of *Kellie* v. *Fraser*[7] the suit was one to file an award, the award covering landed property outside Calcutta. In *Juggernauth Doss* v. *Brijnath Doss*[12] and *Zulekabai* v. *Ebrahim Haji Vyedina*[24] the suits were merely to recover title-deeds. In the following group of cases though the suit was not actually for recovering land, an issue regarding title to the land or some interest in it had to be considered for giving the relief. In *The Official Assignee of Madras* v. *Ramaswami Aiyangar*[19] the suit was to avoid an encumbrance on the land. In *Srinivasa Aiyangar* v. *Cunniappa Chetty*[20] the suit was for the recovery of damages for trees cut and carried away from plaintiff's casuarina plantation, the title to the plantation being in question. Under the General Clauses Act X of 1897 (clause 25 of section 3) "immoveable property" includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. The suit for trees in *Srinivasa Aiyangar* v. *Cunniappa Chetty*[20] may be considered as a suit for immoveable property. This was affirmed in *Srinivasa Aiyangar* v. *Kannappa Chetty*.[21] In *Sudamdih Coal Co., Ltd.* v. *Empire Coal Co., Ltd.*[28] the suit was for compensation for wrongful cutting and removal of coal. In *Vaghoji* v. *Camaji*[22] the suit was for a declaration of the plaintiff's right to *Talao* and for an injunction. In *Pranlal* v. *Goculdas*[31] the suit was for declaring the priority of one mortgage over another. Therefore the above group of cases beginning with

1. (1924) 49 M L.J. 311
3 (1925) I.L.R. 50 B. 1 (F.B).
4 (1927) I.L.R. 51 B. 516 (F.B.)
6. (1876) I.L.R. 1 C 249.
7. (1877) I.L R. 2 C 445.
10. (1875) 15 Beng. L.R. 318.
12 (1878) I.L R. 4 C. 322
17. (1903) I.L.R. 27 M 157.
19 (1912) 23 M L.J. 726
20. (1914) 26 M.L.J. 567
21. (1915) 30 M.L.J. 120
22. (1904) I.L.R. 29 B. 249
24. (1912) I.L.R. 37 B. 494.
27. (1872) 9 Beng L.R. 171
28. (1915) I.L.R. 42 C. 942.
30. (1927) I.L R. 54 C 655.
31. (1925) 27 Bom.L.R. 570.

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The Official Assignee of Madras v. *Ramaswami Aiyangar*[19] do not call for any consideration. In *Sundara Bai Sahiba* v. *Tirumal Rao Sahib*[18] and *Yeshwadabai* v. *Janardhan*[25] the suits were for maintenance seeking to make it a charge on land within the limits of the original jurisdiction but the defendant was not a resident within the said limits. On the ground that the suits for maintenance were suits for land the suits were decreed. It is noticeable that these two cases are in one sense the converse of most other decisions on the subject; whereas, in other cases, the defendant raised the plea that the suit is one for land and therefore the suit does not lie, the land being outside the limits of the original side, in these two suits, it was the plaintiffs that contended that the suit was one for land, the land being within the limits of the original jurisdiction, and it was the defendant that contended that the suit was not one for land. The suits being for maintenance, one feels somewhat inclined to help the plaintiff and this may explain the result in these two decisions though it seems to me that the decisions may be put on another ground. To call a suit for maintenance a suit for land because an item of land is sought to be charged though there is no dispute as to the title seems to me to strain the expression too far. The case might have been put on the ground that part of the cause of action arose within the limits of the original side jurisdiction because a land within such limits was sought to be charged and that being so, the suits could be filed on the original side with leave of the Court. I would agree with the conclusion in these two cases on this ground but not on the ground that the suits were for land. But I would not further utilise these cases for the purpose of this present discussion. There now remain the cases dealing with suits for specific performance.

The earliest of these cases is the case in *Ramdhone Shaw* v. *Nobumoney Dossee,*[11] decided in 1865. This was referred to with approval by Markby and Pontifex, JJ., in *Juggodumba Dossee* v. *Puddomoney Dossee,*[10] and it was mentioned in answer to a question of Garth, C.J.. in *The Delhi and London Bank* v. *Wordie,*[6] and it was considered to be good law by Kennedy, J., in *Kellie* v. *Fraser.*[7] It was cited before Pontifex, J., in *Sreenath Roy* v. *Cally Doss Ghose.*[8] There the suit was originally for specific performance of an agreement to execute a mortgage,

6. (1876) I.L.R. 1 C. 249 7 (1877) I.L.R. 2 C 445
8 (1879) I L.R 5 C. 82. 10 (1875) 15 Beng. L.R. 318 at 329
11. (1865) 1 Bourke's Reports, p 218.
18. (1909) I.L.R. 33 M. 131: 20 M.L.J. 103. 19. (1912) 23 M L.J 726.
25. (1923) 25 Bom.L.R. 1172

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but at the trial the plaintiff's counsel was content with a decree for money and did not ask for any order for specific performance. In spite of this, it was held that the suit did not lie. Pontifex, J., gives no reasons for not following the case in *Ramdhone Shaw* v. *Nobumoney Dossee*.[11] I am inclined to dissent from this case. The same result as in *Ramdhone Shaw* v. *Nobumoney Dossee*[11] was arrived at in *His Highness Shrimant Maharaj Yashvantrav Holkar* v. *Dadabhai Cursetji Ashburner*.[2] It is true that this was dissented from in *The India Spinning and Weaving Co., Ltd.* v. *Climax Industrial Syndicate*,[3] but it was approved in *Hatimbhai Hassanally* v. *Framroz Eduljee*[4] and in *Hunsraj* v. *Runchordas*,[5] which was also a suit for specific performance. The cases in *Land Mortgage Bank* v. *Sudurudeen Ahmed*[13] and *Nagendra Nath Chowdhury* v. *Eraligool Co., Ltd.*[14] which were vendor's suits for specific performance, and in *Ratanchand Dharamchand* v. *Gobind Lall Dutt*,[9] which was a creditor's suit for specific performance of an agreement to mortgage, do not help us very much.

I may observe that in a suit for specific performance the decree is primarily addressed to the defendant; that is, the Court acts *in personam*—which a Court of Equity is always entitled to do. Though the land may be described in the conveyance it is not going to be touched even in the execution of the decree as in the case of a decree for sale on a mortgage, nor does any issue as to the title to the land arise in such a suit. These are strong considerations for holding that a suit for specific performance is not a suit for land.

In the result, I would answer the reference by holding that the suit is not a suit for land.

Odgers, J.

Odgers, J.—I entirely agree with the two judgments just delivered by my Lord and my brother Ramesam. The difficulty or one may say, the impossibility of a definition of a "suit for land" has been commented on over and over again, and in my opinion no definition expressed in general words can possibly be satisfactory in the sense of covering every case which may arise. The only method is to see if the facts of any particular case fall within the meaning of the words; so the question in this case

2 (1890) I.L R 14 B 353. 3 (1925) I L R. 50 B. 1 (F B.).
4 (1927) I.L R. 51 B. 516 (F B). 5. (1905) 7 Bom L R. 319.
9 (1921) I L.R. 48 C. 882
11. (1865) 1 Bourke's Reports, p. 218.
13. (1892) I.L R. 19 C. 358 14 (1922) I.L R. 49 C. 670.

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must in my view be decided with reference to the essential nature of the remedy sought. As my Lord has pointed out, it may be unsafe to apply wholesale the doctrines of the English Courts of Equity to a suit for specific performance in this country where the law on the subject has been codified, but this codification does not and cannot destroy the essential nature of this remedy, *i.e.*, that it acts *in personam* and not *in rem*. Once this fundamental distinction is grasped, it appears to me unarguable that a suit for specific performance is a "suit for land.'' Therefore the suit in question is not a suit for land.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—I agree that a suit by a purchaser of lands for specific performance of a contract to sell is not a suit for land. The reference to the Full Bench, as worded, raises another difficult question, but it is unnecessary to deal with it on account of the view we have taken that the suit in question is not a suit for land.

The expression "suit for land" has given rise to conflicting views and has been, from time to time, the subject of numerous decisions. Some Judges have construed the words as meaning "suits relating to or concerning land." It seems to me that this construction, at any rate, is no longer open to the Indian Courts, having regard to two decisions of the Privy Council, which must be deemed to have held that administration suits are not suits for land. *Benode Behari Bose* v. *Nistarini Dassi*[32] and *Srinivasa Moorthy* v. *Venkata Varada Aiyangar.*[33] That this is the effect of these two cases is assumed at least in three rulings, one of Bombay and two of Madras (*Hatimbhai Hassanally* v. *Framroz Eduljee,*[4] *Krishnadoss* v. *Ghanshamdoss*[1] and *Amir Bi* v. *Abdul Rahim Sahib*[34]). Now, where in a suit for administration, land is involved, it is in a sense "a suit relating to or concerning land"; but such a suit has now been authoritatively held not to be a suit for land.

However reluctant one may be to define the term "suit for land," it is impossible to answer the reference without attempting some kind of definition. I shall not discuss the point, for it has been discussed threadbare, but I shall content myself with stating that, in my opinion, a suit is not a suit for land, unless

1. (1924) 49 M.L.J 311 4 (1927) I.L.R 51 Bom. 516 (F.B).
32. (1905) L.R. 32 I A 193: I.L.R 33 C 180 15 M.L.J 331 (P.C).
33 (1911) L.R 38 I A 129: I.L.R. 34 M 257: 21 M.L.J 669 (P.C.).
34. (1928) 55 M.L.J. 266.

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the decision in that suit primarily involves title to, or primarily affects possession of, land. Applying this test, I am satisfied that the present suit is not a suit for land.

I may take occasion to point out that the conflict in regard to clause (12) of the Letters Patent covers a very wide field. It is not confined to the expression "suits for land" I shall indicate briefly the points respecting which there has been this wide diversity of judicial opinion. Firstly, on the interpretation of the words "suits for land" not only have different Courts taken different views, but a consistent view has not always been taken even by the same Court. Secondly, is the last alternative of cl. (12) beginning with the words "or if the defendant at the time of the commencement," a separate alternative, or, is it dependent on the earlier alternative, beginning with the words "or in all other cases"? See *Hatimbhai Hassanally* v. *Framroz Edulje*.[4] Some learned Judges have held that the final alternative is a separate alternative With what result? Even when it is held that a suit is a suit for land and the property is wholly outside, still the Court can entertain the suit on the ground that the defendant dwells, etc., within the local limits of its jurisdiction. Thirdly, does the clause "in case the leave of the Court shall have been first obtained," which has been compendiously described as the enlarging clause, apply only to the cause of action in all other suits than those for land? (*See* the judgment of Kemp, J., in *Hatimbhai Hassanally* v. *Framroz Edulje*[4]). Fourthly, some learned Judges have gone the length of holding that even where a suit is held to be a suit for land, the Court has jurisdiction, if it can enforce its decree, by the personal obedience of the defendant resident within its local limits. This power is supposed to rest upon what is termed the equity jurisdiction of the Court.

I have set forth in some detail the wide divergence of opinion in regard to this clause with the object of drawing attention to the necessity of recasting the section, for, as Marten, C.J., points out in *Hatimbhai Hassanally* v. *Framroz Edulje*,[4] uncertainty on a matter of such importance as jurisdiction, is liable to lead to serious results

Mackay, J.

Mackay, J.—In a suit for specific performance of a contract to sell relief is given by ordering the person who contracted to sell to do the act which he is under an obligation, a duty enforceable by law, to do: that is to say, in the case of a contract

4 (1927) I.L.R. 51 B 516 at 565, 647 (F.B.).

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to sell land, to execute a conveyance. If the person against whom a decree for the specific performance of the contract has been made has had an opportunity of obeying the decree and has wilfully failed to do so, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both. Since, in the case proposed, the parties who contracted to sell are resident in Madras, a decree if passed might be enforced in this manner. If the decree is not obeyed, the Court may, in lieu of or in addition to these processes, direct that the act required to be done may be done by a person appointed by Court, on the charges of the judgment-debtor.

The judgment-debtor may have an imperfect title or no title at all. Except so far as provided by section 18 of the Specific Relief Act, the Court goes no further. It does not investigate or adjudicate on the title conveyed. It compels the performance of an obligation: it acts as a Court of Equity on the conscience. The person contracting to sell may prove to be unwilling or unable to deliver possession. With that the Court has no concern. The purchaser having obtained his conveyance has, if he finds it necessary, to litigate, whether it be as to title or as to possession, in the local Court of competent jurisdiction, in this case a Court in the District of Chittoor, in which the land is situate. Neither title nor possession is in question in a suit for specific performance, although the decree directs that such title as is in the judgment-debtor be conveyed.

A suit for specific performance is a suit "*in personam*": a suit for land is an action "*in rem*." They are "*toto coelo*" apart: they belong to different jurisdictions which are now no doubt fused. The object of clause (12) of the Letters Patent is to bar the ordinary original civil jurisdiction of the High Court as to actions *in rem*, when the land is situate outside Madras; it does not bar the jurisdiction as to suits *in personam*. The word "*for*" which has occasioned all the difficulty is the same in each case, but a suit for specific performance is not merely in its history but in its nature distinct from a suit for land. That the present suit is concerned with the passing of title to land is a mere accident.

In my opinion, therefore, a suit for specific performance of a contract to sell land without the ordinary original civil jurisdiction of the High Court, when the parties are resident in Madras and amenable to the enforcement of a decree *in personam*, is not a suit for land and the High Court has cognizance in its ordinary original civil jurisdiction.

I would be guilty of repetition, if I added anything further to the judgments which have just been delivered.

N.S. *Reference answered in the negative.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Ramji Patel .. *Appellant** (*Plff.*)

v.

Rao Kishoresingh .. *Respondent* (*Deft.*).

Civil Procedure Code (V of 1908), S 100—Finding of fact erroneous—Interference with—Jurisdiction in Second Appeal—Evidence in support of finding—Existence of—Effect—Specific Relief Act—Ss 12 (c) and 21 (a)—Contract to sell immoveable property—Specific performance of—Decree for—Validity—Finding that compensation in money would be adequate relief to plaintiff—Effect—Compensation not recoverable though awarded—Right to specific performance in case of—S 12 (d) of Specific Relief Act—Effect—S 12, Explanation—Presumption under—Rebuttal of—Finding that compensation in money would be adequate relief if amounts to a

An erroneous finding of fact is a different thing from an error or defect in procedure, and there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, provided the first Appellate Court had before it evidence proper for its consideration in support of the finding.

In a suit for the specific performance of an agreement by the defendant to sell to the plaintiff a portion of the property, which was the subject-matter of a then pending Privy Council appeal by the defendant, in the event of his succeeding in the appeal in consideration of a sum of money advanced to him by the plaintiff for the purposes of the said appeal, the first Appellate Court found (1) that the value of the property at the time of the agreement was not more than was admitted by the plaintiff, *viz.*, Rs 9,000; (2) that the bargain was not extortionate, that it was not even harsh, but that it was fair, and (3) that compensation in money was an adequate relief to the plaintiff And there was ample evidence in support of the findings of the first Appellate Court which was proper for its consideration.

Held, that the findings of the first Appellate Court were binding and conclusive and could not be interfered with in the second appeal

Where, in a suit for specific performance of a contract to sell immoveable property, the Courts below found that compensation in money was an adequate relief to the plaintiff, but nevertheless decreed specific performance of the contract, *held* that, in view of the express provisions contained in Ss 12 (*c*) and 21 (*a*) of the Specific Relief Act, a decree for specific performance of the contract should not have been made.

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*P.C. Appeal No 82 of 1927. 9th May, 1929.

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The presumption referred to in the Explanation to S 12 of the Specific Relief Act is rebutted by proof and finding that the breach of the contract can be adequately relieved by compensation in money.

Proof that any pecuniary compensation that may be awarded for breach of a contract to sell property cannot be recovered affords, under S 12 (*d*) of the Specific Relief Act, a good ground for obtaining a decree for specific performance.

Appeal No. 82 of 1927 from a judgment and decree of the Court of the Judicial Commissioner, Central Provinces (Messrs. Findlay and Prideaux), dated the 22nd August, 1925, which reversed a judgment and decree of the District Judge of Nimar, dated the 8th May, 1924, and restored a judgment and decree of the Court of the Subordinate Judge of Khandwa, dated the 20th November, 1923.

The material facts of the case appear sufficiently from their Lordships' judgment.

The main questions for determination on the appeal to His Majesty in Council were—(1) Whether in second appeal the learned Judicial Commissioners had power to reverse findings of fact of the Lower Appellate Court (Court of the District Judge); and (2) whether the appellant was entitled to specifically enforce against the respondent an agreement, dated the 11th November, 1912 for sale of a village called Khedi

Dunne, K.C. and *Parikh* for appellant.

Kyffin for respondent.

Dunne, K.C.—Section 100 of the Civil Procedure Code restricts the grounds upon which the second Appellate Court could disturb the judgment of the first Appellate Court: *see* section 101 and *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri.*[1] The finding of the District Judge that the agreement was not hard and unconscionable bargain was binding upon the learned Judicial Commissioners.

As to cases when specific performance of a contract should be enforced, *see* the Specific Relief Act, 1877, Chapter II, sections 12, *et seq.* Under the "Explanation" to section 12 of the Act there is a presumption that in case of a contract to transfer immoveable property mere compensation in money would not afford an adequate relief to the party aggrieved and the Court should not ordinarily refuse specific performance. There is a *prima facie* presumption created by the "Explanation."

[*Sir Lancelot Sanderson.*—There is no suggestion that there was no evidence to justify the District Judge's finding that damages were an adequate relief to the plaintiff.]

1. (1890) L.R. 17 I.A. 122.

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A presumption can only be rebutted by proof. There is not a particle of evidence here in support of the finding of the District Judge. The Act expressly provides that it must be proved that compensation would be an adequate relief in case of a contract to sell immoveable property. Refers to illustrations to clause (*c*) of section 12.

[*Sir Lancelot Sanderson.*—What sort of proof do you expect?]

The "Explanation" positively requires that there must be some kind of proof.

Parikh followed, and referred to section 19 of the Act.

Kyffin for respondent.—In view of the District Judge's finding that compensation in money was an adequate relief, specific performance was rightly refused. The Court had no power to make a decree for specific performance, even in the alternative.

The finding of the District Judge that the bargain was not a harsh and extortionate one is bad in law.

9th May, 1929. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner, Central Provinces, setting aside a decree of the District Judge, Nimar. The date of the first mentioned decree was 22nd August, 1925, and the date of the second mentioned—namely, that of the District Judge—was the 8th May, 1924.

In 1908 the defendant-respondent had instituted a suit against two widows to recover possession of an estate known as the Bhamgarh Zamindari, and after having obtained a decree in his favour, that decree was reversed by the Court of the Judicial Commissioner. He desired to prosecute an appeal to His Majesty in Council, and to enable him to do so he had to raise money. He entered into an agreement with the plaintiff on the 11th November, 1912, with regard to the advance of the sum of Rs. 5,000 by the plaintiff on the terms therein mentioned. The agreement was as follows:—

"I have brought from you Rs 5,000 (in words five thousand cash) in order to file my appeal to the Privy Council, and at this time I am very badly in need of this amount, because if you do not pay me the amount now, it will be extremely difficult for me to file the appeal Therefore I lay down in writing and bind myself by this agreement that when I may win my case in the Privy Council in England and a decree may be passed in my favour, I shall at once sell, in lieu of this amount, the full sixteen anna proprietary rights of mauza Khedi out of my villages, Settlement No. 387, tahsil Harsud, district Nimar, area 3,630 87, Government demand

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Rs 125, with all rights, under a duly registered sale-deed and put you in possession of the mauza. If I fail to do so, you may take possession of the mauza and get a sale-deed duly executed through a Civil Court If unfortunately the decree be not passed in my favour and the case decided against me, I shall pay interest at eight annas per cent per mensem on this amount from the date of the decision of appeal, and execute a separate bond for the same agreeing to pay the amount by instalments. I shall not raise any objection And on winning the case, I shall execute a sale-deed o mauza Khedi, tahsil Harsud, in lieu of this amount, without fail Therefore I have executed this deed of agreement with my free will and pleasure on receiving the amount in cash It is true It may remain as a record and be of use when necessary."

Shortly stated, the facts are that he won his case before the Judicial Committee of the Privy Council, which allowed his appeal; and that he refused to carry out the agreement above quoted; hence the present suit.

The remedy sought by the plaint was for a decree as follows:

"(a) Ordering the defendant to execute properly a registered sale-deed conveying validly to the plaintiff his entire interest, consisting of 16 annas, in mauza Khedi as described in list A herewith attached, with all rights appurtenant thereto and to deliver possession of the same to the plaintiff.

"(b) It is also prayed in the alternative that if the Court does not think fit to grant the above relief to this plaintiff for any reason, the Court be pleased to order the defendant to refund the sum of Rs 5,000, with interest at 2 per cent per month on it, from the date of agreement till realization, *plus* such amount by way of compensation to the plaintiff for the loss of the immovable property which he will thus suffer.

"(c) The plaintiff prays for his costs of the suit and such other relief as the Court thinks fit"

The defendant pleaded that the plaintiff was not entitled to a decree for specific performance for the following reasons:—

"(1) That the village Khedi yields a profit of nearly Rs. 1,100 a year, and is now, and was at the time of the agreement worth not less than Rs. 20,000

"(2) The distress and distracted state of mind which the defendant was in at the time of the agreement gave the plaintiff an unfair advantage to secure the village for one-fourth of its value The discretion to decree specific performance should not be exercised in plaintiff's favour under section 22, Specific Relief Act.

"(3) That there has been undue delay in bringing the suit

"(4) That the plaintiff himself, after the decision of the Privy Council appeal, agreed to take the money with interest instead of the village, and thereby induced the defendant to deposit part of the money with Gopal Rao and his son, for payment to plaintiff, and to agree to the plaintiff's retaining Rs 1,161 as stated above The plaintiff is estopped from claiming specific performance."

The suit on remand was tried by the learned Subordinate Judge of Khandwa, who declined to make a decree for specific performance. He held that the village of Khedi was worth at least Rs. 20,000, that the agreement entered into was highly speculative, that it was unfair and extortionate, and he made a

decree in favour of the plaintiff for Rs. 10,000, with interest at the rate of 6 per cent. per annum as stated in the decree. The plaintiff appealed to the learned District Judge, who held that the defendant was in serious money difficulties and was distressed in mind at the time the agreement of the 11th November, 1912, was made, but that he was not overwhelmed by distress, that the value of the village Khedi at the date of the said agreement had not been proved to be more than was admitted by the plaintiff, *viz.*, Rs. 9,000, that the bargain was not extortionate, that the trial Court was wrong in holding that the defendant had been imposed upon by the plaintiff and his supposed confederates, and that the trial Court was wrong in refusing specific performance.

Accordingly the learned District Judge made a decree for specific performance, and he directed that the defendant should execute a sale-deed conveying the village Khedi to the plaintiff.

It is necessary to refer to two other findings of the learned District Judge, *viz.*, (1) that damages would have been an adequate relief to the plaintiff, and (2) that such damages should be Rs. 20,000.

In dealing with this question the learned Judge referred to the ninth ground of the appeal in his Court, which was as follows:—

"That it should have been held that under the circumstances of the case damages was not an adequate relief to the plaintiff, and that at any rate the damages awarded by the Lower Court are grossly inadequate"

The learned District Judge in this respect said as follows:—

"No special damages have been proved by the plaintiff. He simply invested money, and a return of money should normally be sufficient It is not shown that he had any pressing need for land. On the contrary, from the very nature of the contract it is evident that there was no hurry at all, and that not only might plaintiff fail to get the land, but in any case he could not expect to get it for several years Indeed, the only reason for insisting upon specific performance is that the value of the village now is probably more than the money advanced *plus* reasonable interest. Plaintiff can certainly say that he took a risk and that he should be compensated for such risk. But compensation could be given in money This ground of appeal must fail"

In their Lordships' opinion, the learned District Judge came to a clear finding that compensation in money was an adequate relief to the plaintiff, and having regard to the provisions contained in the material sections of the Specific Relief Act (I of 1877), to which reference will presently be made, it is difficult to understand how the learned Judge came to make a decree for specific performance of the contract in view of the abovementioned finding.

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On the hearing of the appeal before this Board it was admitted by the learned counsel for the plaintiff that he was bound by the above-mentioned finding unless he could show that there was no evidence in support thereof, and he argued that there was no such evidence.

It will be convenient to dispose of this question at once.

Their Lordships are of opinion that there was evidence; the nature of the transaction, the terms of the agreement itself, and the other matters mentioned by the learned District Judge in the passage of his judgment, already cited, are sufficient to show that there was evidence on which the learned District Judge could properly arrive at the abovementioned finding. In their Lordships' opinion, therefore, it must be taken for the purposes of this appeal that compensation in money was an adequate relief to the plaintiff for the non-performance of the contract by the defendant, and that the amount of such compensation should be Rs. 20,000.

The defendant appealed to the Court of the Judicial Commissioner, and the appeal was heard by the Judicial Commissioner and the Additional Judicial Commissioner.

The learned Judicial Commissioners on the hearing of the appeal entered into the consideration of questions which were not open to them having regard to the findings of the District Judge and the provisions of sections 100 and 101 of the Civil Procedure Code (V of 1908).

The sections are as follows:—

"100—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

"(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

"101 No second appeal shall lie except on the grounds mentioned in section 100."

With reference to these sections their Lordships find it necessary once more to refer to the well-known passage in the judgment of Lord Macnaghten in *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri*[1] which dealt with the material sections

1. (1890) L.R. 17 I.A. 122 at 127.

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relating to second appeals in the Code of Civil Procedure, 1882. The passage is as follows:—

" . . . . It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding "

The provisions of the above-mentioned sections of the Code of 1908 and the above-mentioned ruling, which is applicable to the present Code, were disregarded in the present case.

As, for instance, the first Appellate Court held that the value of the property at the time of the agreement in 1912 was not more than was admitted by the plaintiff, *viz.*, Rs. 9,000. The Judicial Commissioners did not accept this finding of fact, but they held on the evidence that in 1912 the value of the village was not far below Rs. 20,000.

Again, the first Appellate Court held that the bargain was not extortionate, that it was not even harsh, but that it was fair.

The Judicial Commissioners held that it was a hard and unconscionable bargain, of which specific performance should be refused.

It was not open to the Court of the Judicial Commissioner to interfere with either of the above-mentioned findings of fact of the first Appellate Court, inasmuch as there was ample evidence in support of the findings of the first Appellate Court which was proper for its consideration.

For these reasons alone the judgment of the Court of the Judicial Commissioner cannot be supported.

There is, however, a further difficulty in the way of supporting the judgment of the Court of the Judicial Commissioner. The Judicial Commissioners agreed with the first Appellate Court in the finding that compensation in money was an adequate relief to the plaintiff, and they further held that the value of the village was not far below Rs. 20,000 in 1912, the date of the agreement.

Yet the decree of the Court of the Judicial Commissioner was not for Rs. 20,000, as would have been expected, but a sum of Rs. 11,555-13-4 only was awarded.

Their Lordships understand that this sum was arrived at on the basis that the agreement was a hard and unconscionable

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bargain, and that the plaintiff was entitled to no more than a return of the money advanced by him, together with interest thereon.

It has already been mentioned that it was not open to the Court of the Judicial Commissioner to disturb the finding of the first Appellate Court that the agreement was not harsh or extortionate, and that it was a fair bargain.

It is obvious, therefore, that the judgment and decree of the Court of the Judicial Commissioner should not be allowed to stand.

It remains to consider what is the proper decree on the facts of this case.

In view of the finding of the first Appellate Court it must be taken that the agreement of the 11th November, 1912, was not extortionate, harsh or unconscionable, and that it was a valid and binding agreement. It is clear that the defendant committed a breach of the agreement by his failure to carry out the terms thereof, when his appeal to the Judicial Committee of the Privy Council, referred to in the agreement, was successful. The only other question is to what relief was the plaintiff entitled in the suit?

It was found, as already mentioned by the learned District Judge, that compensation in money was an adequate relief to the plaintiff, and this finding was affirmed by the Court of the Judicial Commissioner.

Their Lordships have already stated that there was evidence before the learned District Judge, who was the first Appellate Court, which would entitle him to arrive at such a finding.

Consequently it must be taken for the purpose of this appeal that the above-mentioned finding stands. Their Lordships desire to add that they see no reason for thinking that the finding of the Courts in India in this respect was in any way incorrect.

The material provisions of the Specific Relief Act (I of 1877) are sections 12 (*c*) (*d*) and the Explanation thereto, 19, 21 (*a*) and 22 and are as follows:—

"12. Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced—

"(*c*) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

"(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done

"EXPLANATION—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property

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cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved."

"19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

"If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

"If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

"21. The following contracts cannot be specifically enforced:—

(a) A contract for the non-performance of which compensation in money is an adequate relief.

"22 The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal

"The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

I Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part."

Reliance was placed by the learned counsel for the plaintiff on the explanation to section 12, and urged that the learned District Judge was right in making a decree for specific performance.

The obvious answer is that in this case the presumption referred to in the explanation was rebutted because it was proved and found that the breach of the contract could be adequately relieved by compensation in money.

It was further argued that it was probable that pecuniary compensation could not be got for the non-performance of the act agreed to be done, and that consequently the case fell within section 12 (*d*).

This point, as far as their Lordships can discover, was not taken in the Courts in India, nor was it mentioned in the reasons set out in the plaintiff-appellant's case on appeal to this Board.

The learned counsel for the plaintiff was not able to draw their Lordships' attention to any evidence which would justify them in holding that there is a probability that pecuniary compensation, if awarded, cannot be recovered. If there were any substance in this point, it would undoubtedly have been relied on by the plaintiff, because, if proved, it would have afforded a good

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ground for obtaining the decree for specific performance which he desired.

In view of the finding that compensation in money is an adequate relief to the plaintiff and in view of the express provisions contained in sections 12 (*c*) and 21 (*a*), their Lordships are of opinion that a decree for specific performance of the contract should not be made.

The decree, therefore, must be for compensation in money, and the only remaining question is one of amount.

There is no difficulty in this respect. It is clear that at the date of the breach of the contract the value of the village was about Rs. 20,000, and the learned District Judge held that the amount of the "damages," which he thought would have been an adequate relief, was Rs 20,000.

The proper order, therefore, is that a decree in favour of the plaintiff should be made for Rs. 20,000, with interest thereon at the rate of 6 per cent. per annum until realisation.

Consequently, their Lordships are of opinion that the plaintiff's appeal should be allowed, and that the decrees of the Courts in India should be set aside except in so far as the said decrees relate to the payment of costs, that a decree should be made in favour of the plaintiff as above mentioned, that the defendant should pay the costs of this appeal, and that the order of the Court of the Judicial Commissioner as to payment of costs contained in the decree of the 22nd August, 1925, should stand, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent: *Valpy, Peckham & Chaplin.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS.

Lazar Fernando .. *Petitioner** (*Accused*)

v.

Amirtham Fernando .. *Respondent* (*Complainant*).

Fernando v. Amirtham Fernando.

Opium Act (I of 1878)—Madras Abkari Act (I of 1886)—Right of private complaint

There is no right of private complaint under the Opium Act or the Madras Abkari Act

*Cr.M.P. No. 791 of 1928. 22nd February, 1929.

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Petition praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings of the Court of the Sub-Magistrate of Tuticorin in C.C. No. 322 of 1928.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for petitioner.

K. Venkataraghavachariar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—In this case the complainant, a brother of the accused, has laid his complaint in the Court of the Sub-Magistrate of Tuticorin under section 55 of the Abkari Act and section 9 (*c*) and (*d*) of the Opium Act. The story is very shortly, that the accused was seen by the complainant and others going down towards the shore, where it is said he had a boat ready to ship ganja and opium on board a vessel that was lying at the port of Tuticorin. The complainant and his party are said to have arrested the accused. The former informed the Sub-Inspector who arrived with two constables at about 1 o'clock in the morning and to whom the accused, who is said to have had a sack with him, was handed over by the complainant and his party. Objection was taken that the provisions of both the Abkari and the Opium Acts prohibit prosecution by private individuals and that, therefore, the complainant had no *locus standi* to institute these proceedings as the police refused to interfere and referred the case as false, apparently believing that the accused was beaten by the prosecution witnesses and the bundle of exciseable goods was foisted upon him while drunk, the prosecution witnesses as well as the accused being, in the opinion of the police, notorious smugglers.

Now the question is whether there is any right of private complaint under these two Acts. As regards the Abkari Act, Madras Act I of 1886, there is a long series of sections in Chap. VIII headed "Powers and Duties of Officers, etc." For instance, certain Abkari and Police officers may search and arrest (section 31), or enter and inspect premises (section 32), and the Collector or Magistrate may on information issue a warrant to search (section 30), any officer of the Abkari, Salt, Police, Land Revenue or Customs Departments or any other person duly empowered may arrest (section 34). By all these sections there is provided a special procedure, *e.g.*, a preliminary enquiry before an Abkari Inspector who may summon witnesses

(section 40 following). The Abkari Inspector may forward a person in custody to a Magistrate and his report is to be treated as a complaint (section 50). Throughout the Act there is no mention of any private person having power to arrest. In fact, several sections provide that the person who is to take action should be not below a certain rank. Here there was of course no complaint by an Abkari Officer under section 50. We have the authority of a Bench of this Court in *Kuppuswami Naidu, In re* [1] to the effect that, on an abkari offence, if a charge sheet is put in under the ordinary police procedure, the proceedings are not properly instituted, because they are not in accordance with the procedure to which I have referred contained in the Abkar' Act. The learned Judges held that the accused person has tl . right to a special procedure regulating the course of the investigation and that, he having been denied this special procedure, he was placed under a considerable disability. They also held that the matter is governed by the provisions of the Abkari Act read with section 5.(2) of the Criminal Procedure Code, adding that there is a much more formal enquiry laid down under the Act than is laid down under the Criminal Procedure Code. The case in *Lakshmi Narasayya* v. *Narasimhachari*[2] may also be referred to. That was an insolvency offence specially provided for by the Presidency Towns Insolvency Act. It was there held that, as the offence is created by that Act and the Insolvency Court was constituted into a special tribunal to try that offence with a special procedure, the ordinary Criminal Procedure Code was not applicable. I think, therefore, there is no doubt that under the Abkari Act the proceedings must be initiated and conducted under the elaborate rules contained in the chapter and sections of the Act to which I have referred. It is obvious that that was not done in the present case.

Now the further question arises with regard to the Opium Act, because, it is said, that in this sack of which the accused was in possession, when he was seen by the Police, were 1½ lbs. of opium besides a very considerable quantity of ganja. The latter will clearly fall under the Abkari Act, but we have to deal with the opium and the complaint laid under that Act. Now the Opium Act is an Imperial Act and was passed as long ago as 1878 and Mr. Jayarama Aiyar, the learned Advocate for the accused and the learned Public Prosecutor say that their researches have not enabled them to find any authority on this

1. (1922) 44 M.L.J. 231. 2. (1913) 25 M.L.J. 577.

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Act. So, it is unfortunately for me a question of first impression as to whether a similar or somewhat similar procedure is contemplated by the Opium Act as is laid down in the Abkari Act. The Act is very much shorter than the Abkari Act and there is much less detail in it. To begin with, there is a prohibition against the possession of opium. That is all we are concerned with in this case (section 4). Then the Local Government may make certain rules with regard to this possession, etc. Then S. 9 (*c*) provides a penalty on conviction before a Magistrate for possessing opium; section 11 provides for the confiscation of opium in certain cases; section 14 gives the power to enter, arrest and seize. Now that power is given to any officer of any of the departments of Excise, Police, Customs, Salt, Opium or Revenue, superior in rank to a peon or constable, who may in right of his office be authorised by the Local Government in this behalf He may enter into a building where he has reason to believe opium is manufactured, kept or concealed, seize the opium, detain, search or arrest any person whom he has reason to believe to be guilty of any offence relating to such opium. Section 15:

> "Any officer of any of the said departments may seize in any open place or detain or search any person whom he has reason to believe to be guilty of any offence and, if such person has opium in his possession, arrest him."

Section 18 provides for punishment for vexatious entry or search or seizure or arrest. Then section 19:

> "The Collector of the District, Deputy Commissioner or other officer authorised by the Local Government in this behalf, either personally or in right of his office, or a Magistrate, may issue a warrant for the arrest of any person whom he has reason to believe to have committed an offence relating to opium, or for the search, etc"

Section 20:

> "Every person arrested and things seized under section 14 or section 15 shall be forwarded without delay to the officer in charge of the nearest police station, and every person arrested and thing seized under section 19 shall be forwarded without delay to the officer by whom the warrant was issued."

Then follows a sub-paragraph:

> "Every officer to whom any person or thing is forwarded under this section shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or thing."

I take it that that means that the person arrested and the thing seized are to be forwarded to the officer in charge of the nearest police station or to the officer who has issued the warrant and he has to take steps according to law to bring the person to punishment and to deal with the things seized, under section 11. There is no mention throughout the Act of any right of private

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arrest or complaint. Although the Act, as I have said, does not contain these elaborate provisions of the Abkari Act, there is very little doubt in my mind, that for an offence against the Opium Act, the procedure which is indicated in that Act is to be strictly followed; that is to say, that the officers of the departments mentioned together with the Collector of the District, Deputy Commissioner or other officer authorised by Government have alone the power to initiate proceedings. The utmost that a private person can do is to set one of these authorised persons in motion by information. That, it will be noticed, was attempted to be done in the present case by the information to the police, but the police have referred the complaint as false. In any event, there would seem to be no warrant for the previous private arrest by the complainant and his party of the accused. I see no reason, therefore, to hold that there is any essential difference between the procedure under these Acts.

Now, the second point urged before me was, that the Second-class Magistrate of Tuticorin was not authorised to try this offence as under the Opium Act "Magistrate" means outside the Presidency Towns a Magistrate of the first class, or (when specially empowered by the Local Government to try cases under this Act) a Magistrate of the second class. It was held in a case in *Mahomad Kasim* v. *King-Emperor*[3] by Spencer and Seshagiri Aiyar, JJ., that the notification in the Gazette of the 12th October, 1880, was an insufficient compliance with section 3 of the Opium Act, and that, where a class of officials is invested with powers, such officials are only generally and not specially empowered. Government apparently were advised to issue a fresh notification, which they did in June, 1915, where they specially empower the Second-class Magistrate of Tuticorin in the District of Tinnevelly. That was held by Mr. Justice Ayling and myself to be a sufficient compliance with the notification, and that that was a special empowering of the person holding that office, which would satisfy the requirements laid down by the learned Judges in *Mahomad Kasim* v. *King-Emperor.*[3] That point therefore goes.

Having regard to my decision on the Abkari and Opium Acts, the proceedings in C.C. No. 322 of 1928 on the file of the Sub-Magistrate of Tuticorin must be quashed on the ground that he has no jurisdiction under the circumstances to entertain the complaint made to him by the complaint. The accused will be set at liberty.

N.S. *Proceedings quashed.*

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3. (1915) 2 L.W. 233.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE TIRUVENKATACHARIAR.

Sivaswami Aiyar .. *Appellant* (Applt. in S.A. No. 401 of 1922 on the file of the High Court—Plff.)*

v.

Thirumudi Chettiar and others .. *Respondents (Respts. in do.—Defts. 1 to 4).*

Sivaswami Aiyar *v* Thirumudi Chettiar.

Will—Construction—Charity—Absolute dedication to—Bequest to a person in perpetuity subject to charge in favour of charity—Test—Trust, religious or charitable—Trustee of—Alienation of trust property by—Validity—Conditions—Invalid alienation by him—Suit for recovery of property subject of—Maintainability by him of—Estoppel—Trusts Act, S. 64—Applicability—Simple mortgagee—Decree-holder execution purchaser of trust property in execution of decree against trustee—Right of, to protection afforded by section—Suit r[illegible] ramed—Maintainability of—Test real of.

By his wi[illegible] Hindu purported to deal with his self-acquired immoveable properti[illegible] sisting of nanja and punja lands and also with certain sums of mor[illegible] elonging to him. Out of the immoveable properties he gave a portion [illegible]s adopted son. As regards the remaining immoveable properties and the sums of money, the will provided as follows "Barring those" (lands given to the adopted son) "the remaining 7 mahs and 35 kulis my sister's son Venkataramier enjoying permanently ([illegible]) shall with the income of the said lands and the interest deriavble from the capital amount of Rs. 584 kept by me for that purpose feed in his own house at Mayavaram every Dwadasi day according to his pleasure not less than 10 Brahmins. With the income and interest on Rs. 200 I have reserved with the said Venkataramier, Archanai should be done and offerings presented to Srimath Saba Nayagar of Chidambaram at Pradosha times and Archanai with kunkumam is to be performed every Friday for Sivakamisundari. All these things the said Venkataramier himself shall conduct permanently ([illegible]) and after him, his younger brother Sivaswami shall conduct and afterwards, their heirs should conduct them." The schedule annexed to the will classified the properties as follows:—(1) Properties given to the adopted son; (2) Details as to the fund of Rs. 584 kept for the aforesaid Dwadasi Dharmam; (3) Particulars as to the remaining lands (after deducting those given to the adopted son) which Venkataramier is to enjoy permanently for the purpose of conducting the aforesaid Dwadasi Dharmam.

Held that, on the true construction of the will, the entire income of the lands was dedicated to the trust, and that Venkataramier, Sivaswamier and their successors were constituted only as trustees for the conduct of the charities.

Held further, that the gift of the entire income being devoted to charity amounted to the gift of the corpus itself to the charity, and that it was not therefore competent to Venkataramier to alienate the property except for the necessary purposes of the trust.

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*L.P.A. No. 106 of 1926. 3rd September, 1928.

Sivaswami Aiyar v. Thirumudi Chettiar.

A trustee of a religious or charitable trust has no power to make any alienation of trust property except where it is rendered necessary in the interests of the trust and any alienation which is not justified by real necessity or by reasonably accredited necessity for the purposes of the trust is void, and, in the case of public trusts religious or charitable even the trustee who alienates can bring a suit for the recovery of the property and he is not personally estopped from doing so

Section 64 of the Trusts Act does not apply to public or private religious or charitable trusts. In any case the protection afforded by the section is not available to a transferee under a simple mortgage on which possession does not pass to the transferee A judgment-creditor of the trustee who purchases trust property in Court auction is not also entitled to the benefit of the section

The question whether a suit as framed is maintainable must be judged with reference to the circumstances as they existed at the date of the plaint

Appeal under clause (15) of the Letters Patent against the judgment of the Hon'ble Mr. Justice Odgers in S.A. No. 401 of 1922 preferred against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in A.S. No. 30 of 1921 (O.S. No. 136 of 1919 on the file of the Court of the Additional District Munsif, Tiruvalur).

T. R. Srinivasan for *K. Bhashyam Aiyangar* for appellant.

K. Chandrasekara Aiyar for *C. A. Seshagiri Sastriar* for respondents.

The judgment of the Court was delivered by

Tiruvenkatachariar, J.

Tiruvenkatachariar, J.—This appeal is preferred against the judgment of Mr. Justice Odgers dismissing with costs S.A. No. 401 of 1922. The plaintiff is the appellant before us and the main question involved in this appeal is whether the suit properties which originally belonged to one Panchanathier were by his will, dated 8th January, 1898 (Ex. A in the case) dedicated absolutely for the performance of a charity styled by him as Dwadasi Dharmam and the persons expressly nominated by him in the will for the conduct of the said charity, *viz.*, his nephews Venkataramier and Sivaswami were constituted as mere trustees for the performance of the said charity or whether under the said will Panchanathier bequeathed the suit properties to Venkataramier personally subject to a trust in favour of the said charity which was to be conducted by him and after his death by his younger brother Sivaswami and after the latter's death by their heirs in perpetuity.

The plaintiff's case is that the properties are absolutely dedicated to the charity and that Venkataramier had no beneficial interest therein but was constituted only as a trustee for

the performance of the charity with a wide discretion as to the manner of performing it and that after Venkataramier's death, he, the plaintiff, is the trustee for conducting the said charity. Venkataramier, however, in breach of the trust, mortgaged the suit properties to Sadayappa Chetti, the father of defendants 1 to 3 under Ex. B. After the death of Sadayappa Chetty and Venkataramier, defendants 1 to 3 brought a suit against Venkataramier's widow to enforce the said mortgage and obtained a decree for the sale of the said properties. The present suit was instituted by the plaintiff before the properties were sold in execution of the mortgage decree, the reliefs sought by the plaintiff being a declaration in his favour as trustee of the charity that the mortgage of the suit properties by Venkataramier and the decree obtained thereon are not binding on the trust and for an injunction to restrain the defendants from interfering with the possession of the property. While the suit was pending in the trial Court, defendants 1 to 3 purchased the suit properties in the sale held in execution of their decree and got into possession thereof. The 4th defendant is the widow of Venkataramier. She has been *ex parte* throughout.

The main pleas of the defendants 1 to 3 are—(1) denial of the genuineness of Panchanathier's will, and (2) suit barred by limitation as it was not brought within 12 years from the date of the mortgage to their father. No plea was raised by them in the alternative that even if the will is to be found genuine, the devise of the suit property therein is not to the charity absolutely, but to Venkataramier burdened with a trust in favour of the charity. The trial Court held that the will is genuine and that under it the suit properties are dedicated in trust for the charity. It overruled the plea of limitation. At the trial a further point was raised by the defendants that as they themselves had then got into possession of the properties, the suit for a bare declaration and injunction was not maintainable. With reference to that objection, the plaintiff prayed for an amendment of the plaint by adding a prayer for possession but the District Munsif rejected that application. He however held that the suit was maintainable in the form in which it was brought as on the date of the plaint the defendants were not in possession. In that view he gave a decree for plaintiff for the declaration and injunction prayed for.

Against that decree defendants 1 to 3 preferred an appeal which was heard by the Subordinate Judge of Mayavaram. The learned Subordinate Judge affirmed the finding of the District

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Munsif as to the genuineness of the will. He further held that the suit was barred by limitation under Art. 134 of the Limitation Act as it was not brought within 12 years from the date of the mortgage. He then allowed a further question to be raised, *viz.*, whether on the construction of the will the devise of the lands was in trust for the charity or to Venkataramier personally burdened with an obligation to perform the charity, and he held that the lands were not given in trust for the charity but that they were given to Venkataramier for his own enjoyment with a burden or obligation to conduct the charity with the income thereof. As regards the objection taken to the maintainability of the suit he held that as the suit in its inception was rightly framed, it was maintainable. On this point, however, we find that the Subordinate Judge in another place in his judgment expresses the opposite opinion. He says:

> "Therefore though the suit was properly laid with a consequential relief on the date of suit, yet it was not a suit which could be maintained on the date of the trial as it was then only a suit for a bare declaration without a prayer for possession and without any consequentral relief."

The Subordinate Judge also observes that the District Munsif was wrong in rejecting the plaintiff's petition for amendment of the plaint by adding a prayer for possession. Upon those findings the Sub-Judge holds that Venkataramier had the right to alienate the properties and that the only right which the plaintiff has is to see that the charity is duly performed and that the persons in possession of the properties, whoever they may be, should contribute for the same out of the income of the properties. By his decree, however, he dismissed the suit with costs. Against the Subordinate Judge's decree the plaintiff appealed to this Court in Second Appeal No. 401 of 1922 which came on for hearing before Mr. Justice Odgers. The learned Judge has dealt with only two questions in his judgment as sufficient for the disposal of the appeal and they are: (1) Limitation, and (2) the construction and effect of the will. On the first question he observes that the defendants gave up their contention that the suit was barred by limitation. On the second question he agreed with the Subordinate Judge's construction of the will that the properties were not dedicated absolutely to the charity, but were given to Venkataramier personally burdened with the obligation to conduct the charity. In that view no further question arose and the appeal was dismissed with costs.

On behalf of the appellant, it is contended that the construction put upon the will by the learned Judge and the Sub-

ordinate Judge is erroneous and that on its right construction the suit properties are dedicated to the charity, that Venkataramier has no beneficial interest therein, and that the plaintiff is entitled to a decree as prayed for. The appellant also contends that the amendment of the plaint by adding a prayer for possession should be allowed and a decree for possession given to him in this suit.

The respondent's advocate supports the decree appealed for not only on the ground taken by the learned Judge, but also on a further ground, *viz.*, that the mortgagee, their father, was a *bona fide* transferee of the suit properties in good faith and for consideration, and that as such he acquired a valid title thereto which in any view of the construction of the will would prevail against the trust.

The main question we have to consider relates to the construction of the will, whether, according to its terms, there is an absolute dedication of the suit properties to the charity or whether the suit properties were given to Venkataramier in perpetuity subject to a charge in favour of the charity. Under the will the testator purports to deal with his self-acquired immoveable properties consisting of nanja and punja lands of the total extent of 16 mahs and 77 kulis and also with certain sums of money belonging to him. Out of the immoveable properties he gives 9 mahs and 42 kulis to his adopted son. As regards the remaining immoveable properties and the sums of money, the will provides as follows:

"Barring those (lands given to the adopted son) the remaining 7 mahs and 35 kulis my sister's son Venkataramier enjoying permanently (சாசுவதமாய் அநுபவித்துக்கொண்டு) shall with the income of the said lands and the interest derivable from the capital amount of Rs. 584 kept by me for that purpose feed in his own house at Mayavaram every Dwadasi day according to his pleasure not less than ten Brahmins With the income and the interest on Rs. 200 I have reserved with the said Venkataramier, Archanai should be done and offerings presented to Srimath Saba Nayagar of Chidambaram at Pradosha times and Archana with kunkumam is to be performed every Friday for Sivakamisundari. All these things the said Venkataramier himself shall conduct permanently (சாசுவதமாய் நடத்திவருவது) and after him, his younger brother Sivaswami shall conduct, and afterwards their heirs should conduct them."

It will be seen that so far as the provisions of the will go, the income of the properties is to be devoted entirely to the charitable and religious purposes mentioned therein. The Rs. 584, the income of which is to be utilised for the Dwadasi Dharmam, consists of two decree amounts and three simple loans which were outstanding and which Venkataramier would have to realise for the purpose of conducting the charity. Both

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the charity and the Archanas at the temple are to be performed for ever. As regards the persons who are to see to the performance of the said charity and the Archanas, the will says that they should be conducted by Venkataramier himself permanently during his life-time and after him by his younger brother Sivaswami and after the latter's death by their heirs-at-law; and it is also quite clear that the persons who have successively to conduct the charities have to do so with the incomes and the funds provided therefor, *viz.*, in the case of the Dwadasi Dharmam the income from 7 mahs and 35 kulis and the interest derived from the fund of Rs. 584, and as regards Archana from the income of the Rs. 200 kept with Venkataramier. As regards the manner of conducting the charity, the will leaves a large amount of discretion to Venkataramier who may conduct it in his own house at Mayavaram; but he should feed not less than 10 Brahmins every Dwadasi day. As regards his successors there is no similar provision. They are merely required to conduct the charity out of the income of the lands and the fund of Rs. 584. Nor is there any provision in their case as to their permanently enjoying or permanently conducting the charities as there is in the case of Venkataramier. It is, however, quite clear that Venkataramier's permanent enjoyment of the land (whatever that may mean) is subject to, firstly, his feeding not less than 10 Brahmins every Dwadasi day, and secondly, to the corpus of the charity funds, *i.e.*, both the lands and the money passing intact to his successors who have to conduct the charity. If the testator's intention was (as in our opinion the will clearly shows) that after Venkataramier's life-time the entire income from the lands and the fund of Rs. 584 are to be devoted to the charity, is there anything in the will to indicate a different intention on the part of the testator as to the disposal of the income from the land during Venkataramier's life-time. It is argued that as the will says that he is to enjoy permanently (சாசுவதமாய் அநுபவித்துக்கொண்டு) the testator intended to benefit him also personally and the benefit intended is not only to enure during his life-time but permanently. As the learned Judge puts it, he is to have an estate in fee-simple, though subject to the trust created in favour of the charity. In that view the property will descend to the personal heirs of Venkataramier and will also be alienable but in the hands of the heirs or alienees it will be subject to the trust. In other words, those who own the property for the time being will be bound to make over to the person who has to conduct the

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charity according to the will, the amount which may be required for it. This construction seems to us to be unwarranted. It rests chiefly on the expression "Venkataramier shall permanently enjoy." But the Tamil word (சாசுவதமாய்) is also used later on with reference to Venkataramier himself conducting the charity and it must be taken that the testator used the word in the same sense in both the places. In our opinion both those provisions relate only to the life-time of Venkataramier. In this view even if the construction were possible that some beneficial interest was intended in the property for Venkataramier it will enure only during his life-time. After his death the duty of conducting the charity is cast upon his younger brother Sivaswami and after him upon his successors as provided in the will. For the due performance of that duty Sivaswami and his successors in the office of trustee must be in possession of the income from the properties devoted to the trust as it is with those incomes the charity is to be conducted. The view that Venkataramier is to have some beneficial interest in the property is based on the provision in the will that he should feed *not less than* 10 Brahmins according to his pleasure. It is argued from this that during some years there may be a surplus which he may utilise for himself and therefore the testator intended to benefit him also personally, but it may also happen that during some years the income of the property may not be sufficient to feed even the 10 Brahmins every Dwadasi day. But all the same the testator enjoins that not less than 10 Brahmins should be fed every Dwadasi day. The properties are after all comparatively small, about 2 acres of wet and dry lands in the Mayavaram Taluk and a fund of Rs. 584 which had yet to be realised from the debtors. If the testator had limited the number of persons to be fed there may be some plausibility in the view taken. But instead of that he says that 'not less than 10 Brahmins should be fed' which indicates that the feeding of the Brahmins as far as the income will permit was his chief concern. The view taken by the learned Judge and the Sub-Judge involves the further anomaly that the property is to be held by Venkataramier's heirs or alienees but they are bound to make over the income thereof to Sivaswami and the other persons who are to conduct the charities and who if they liked could devote the whole of its income to charity, if indeed they are not bound to do so. The ownership of the property is under those circumstances reduced to nothing and such an owner cannot be expected to take any real interest in the management of the property

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the income of which he is to hold subject to the control of another. In our opinion a construction which leads to such a result can hardly be attributed to the testator. The main object of the testator is to provide permanently for the conduct of the charity and Archanas which he founded for his own spiritual welfare which purpose cannot be secured unless the properties he had set apart for the trust remained intact. That the testator's only object was to provide for the permanent conduct of the charity is made clear from the recitals in the schedule which however were not referred to during the arguments. There he classifies the properties as follows:—

(1) Properties given to his adopted son, (2) details as to the fund of Rs. 584 kept for the aforesaid Dwadasi Dharmam, and (3) particulars as to the remaining lands (after deducting those given to the adopted son) which Venkataramier is to enjoy permanently for the purpose of conducting the aforesaid Dwadasi Dharmam.

This recital clearly shows that the sole object of the permanent transfer to Venkataramier was for the conduct of the charity and for nothing else. Looking at the provisions of the will as a whole we are of opinion that the entire income of the lands is dedicated to the trust and that Venkataramier, Sivaswamier and their successors were constituted only as trustees for the conduct of the charities and that the provisions relating to Venkataramier only show that during his lifetime he should alone conduct the charities and he should not be held accountable so long as he continued to feed not less than 10 Brahmins every Dwadasi day. The gift of the entire income being devoted to charity amounts in our opinion to the gift of the corpus itself to the charity and Venkataramier was only in the position of a trustee for the charity. It was not therefore competent to Venkataramier to alienate the property except for the necessary purposes of the trust, but such contingency can hardly arise in this case because, it is only out of the income of the property the charity is to be conducted and the corpus need not therefore be alienated at all. It therefore follows that neither the mortgage of the property by Venkataramier under Ex. B in favour of the father of defendants 1 to 3 nor the decree obtained by defendants 1 to 3 on the mortgage nor the purchase of that property in execution of that decree can affect the rights of the plaintiff as trustee for the charity.

The respondent's advocate however sought to support the decree on another ground, *viz.*, that the mortgagee was a *bona*

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fide purchaser of the property without notice of the trust and therefore the alienation in his favour cannot be impeached. This also is a question which was not raised in the Trial Court. In the Lower Appellate Court, however, these defendants raised the plea of limitation and in support of that plea they relied upon the said allegations. The plea of limitation was given up before the learned Judge of this Court. Now before us it is contended that the Subordinate Judge has found that the father of these defendants had been duped by Venkataramier into believing that it was his private property and that he *bona fide* believing the same took the mortgage for consideration. The contention thus advanced is in our opinion no less startling than untenable. If it is sound the only result will be that no public trust is safe because all that a fraudulent trustee has to do is to convey it to somebody who is foolish enough to believe what the fraudulent trustee says, *viz.*, that the property conveyed is his personal property and does not make any enquiries. In this case the mortgage in favour of the father of defendants 1 to 3 was a simple mortgage executed in 1903 and if the mortgagee had taken the ordinary precaution which every purchaser is expected to make of requiring the vendor to purchase an encumbrance certificate he would have become aware of the trust created by the will of 1898. A trustee of a religious or charitable trust has no power to make any alienation of trust property except where it is rendered necessary in the interests of the trust and any alienation which is not justified by real necessity or by reasonably accredited necessity for the purposes of the trust is void and the decisions have gone to this extent, *viz.*, that in the case of public trusts religious or charitable even the trustee who alienates can bring a suit for the recovery of the property and he is not personally estopped from doing so. See Mr. Ganapathy Aiyar's *Hindu and Mahomedan Endowments*, 2nd Edition, page 532 and footnote (7) where all the authorities are collected. The respondent's advocate relies on section 64 of the Indian Trusts Act in support of the contention but that section does not help him, because, in the first place, the Act does not apply to public or private religious or charitable trusts; secondly, even if the rule embodied in that section can be applied by way of analogy to religious or charitable trusts, the protection afforded by the section is only with reference to property in the hands, *i.e.*, in the possession of the alienee and not a transfer by way of simple mortgage as in the case before us, on which possession did not pass to the transferee. Further,

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according to the terms of the section itself, a judgment-creditor of the trustee who purchases trust property in Court auction is not entitled to the benefit of the section. We have therefore no hesitation in overruling this contention as altogether untenable.

The next question we have to consider is what is the decree to be passed in this case. Defendants 1 to 3 are now in possession of the suit properties though they were not in possession at the date of the suit. The plaintiff's application for the amendment of the plaint should have been allowed by the trial Judge and not dismissed and the Lower Appellate Court has taken a correct view on that point. The question whether the suit as framed is maintainable has to be judged with reference to the circumstances as they existed at the date of the plaint and the plaintiff's suit cannot therefore be dismissed as it has been done by the Lower Appellate Court whose decree has been affirmed in Second Appeal No. 401 of 1922.

We set aside the decree of this Court and of the Lower Appellate Court and remit the case to the Court of first instance with the direction that the plaintiff should be permitted to amend the plaint by adding a prayer for possession of the suit properties and paying the Court-fee thereon within a fortnight after the receipt of this order by the Court of first instance and on such amendment being made the decree of that Court will be modified by awarding to the plaintiff possession of the suit properties.

We award to the appellant his costs in this Court and in the Lower Appellate Court to be paid by the contesting respondents (defendants 1 to 3).

A.S.V. *Decree set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Alluri Venkatasomaraju and others .. *Appellants** (*Plffs.*)

v.

Alluri Varahalaraju *alias* Ramabadri Raju and others .. *Respondents* (*Defts.* 2 *to* 20 *and L.Rs. of* 1*st deft. and L.R. of* 4*th deft.*).

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Limitation Act (*IX of* 1908), *Art.* 47—*Person bound by the order—Order against the manager of a joint Hindu family as such—Other members*

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*S.A. No. 297 of 1925 25th January, 1929.

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of the family whether bound by the order—Persons not parties to the order but having notice of it—Whether bound by the order—Sale—Covenant for possession and enjoyment—Knowledge of vendee that vendor's title defective and covenant for possession ineffective—Vendee's right to compensation for breach of covenant.

Where the manager of a joint Hindu family in his capacity as such is a party to proceedings under section 145 of the Criminal Procedure Code, the joint family as a whole is a party and the proceedings bind any member of the joint family in his capacity as such. Consequently, a suit by a member of a joint family to recover possession of immoveable properties from the defendant whose possession had been confirmed by an order under S. 145 of the Criminal Procedure Code to which the manager of the joint family alone was a party and not the other members of the family, is barred under Art 47 of the Limitation Act unless brought within three years from the date of the order.

Ram Sahai v. *Binode Bihari Ghosh,* (1923) I.L.R. 45 All 306 referred to

Where a vendee was not only aware of the defect in the title of the vendor but also knew that the covenant for possession and enjoyment in the sale-deed must be entirely ineffective, he is not entitled to recover compensation from the vendor for breach of the covenant.

Mahomed Ali Sheriff v. *Venkatapathi Raju,* (1920) 39 M.L.J. 449 distinguished

Per Odgers, J—All persons who, though not parties to an order under section 145 of the Criminal Procedure Code, have had actual notice of the order, are "bound" by that order within the meaning of Art. 47 of the Limitation Act.

Appeal against the decree of the District Court of Godavari at Rajahmundry in A.S. No. 63 of 1922 preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in O.S. No. 37 of 1920.

The Advocate-General and *V. Govindarajachari* for appellants.

S. Varadachariar, P. Somasundaram, A. Satyanarayana, B. V. Ramanarasu and *S. Narayana Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS. *Odgers, J.*—In this case the plaintiffs are the appellants. In September 1920 they brought this suit to recover possession with mesne profits of certain lands from the defendants. Plaintiffs' father bought the land in question from defendant 1 in 1911 Proceedings were taken in June, 1915 against the plaintiffs' father under S 145, Criminal Procedure Code, when defendant 2 resisted his possession in which the possession of the 2nd defendant in the land was confirmed. The question is whether those proceedings bind the plaintiffs who are the undivided sons of their father Alluri Subbaraju who bought the property on behalf of the joint family. The Odgers J.

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importance of it is this, that if those proceedings do bind the present plaintiffs they are out of time with this suit, because it was instituted more than three years from the date of the final order in the case (Ex III) under section 145, Criminal Procedure Code. It is argued that this order does not bind the sons who were not parties to it and was made without jurisdiction. The order came up to this Court in Criminal Revision Case No. 205 of 1916 after the death of the father Alluri Subbaraju when 1st plaintiff asked to be brought on as a legal representative of his father. In the then state of S. 145, Criminal Procedure Code, this was impossible, but this Court held that this order was not made without jurisdiction. We are therefore bound by this decision as to this latter point. An order under S. 145, Criminal Procedure Code, applies to anybody bound by such order or any one claiming under such person. It is perfectly clear that the plaintiffs were aware of the proceedings, also that the property was acquired for the joint family and the plaintiffs' father was in possession as manager on their behalf. It is also plain that S. 145, Criminal Procedure Code, is only a *quasi* criminal matter as it falls within the purview of Art. 47 of the Limitation Act unlike most criminal proceedings. In *In re Nathubhai Brijlal*[1] it was held that all parties with actual notice of the proceedings under S. 145 were bound by them That has also been held here in Criminal Revision Case No. 87 of 1917. So that, not merely the actual parties to, but all persons who may be concerned in, the dispute are parties with whom the Magistrate has to deal, the object being to prevent a breach of the peace. So it is not only the actual parties to the order but all parties with notice of the proceedings who are bound. In *Ram Sahai* v. *Binode Bihari Ghosh*[2] it is distinctly laid down that where the manager of a joint family has taken proceedings under S. 145 as the managing member he and the whole family are bound by the order under it. This seems to be in accordance with reason and commonsense. There, therefore, seems no good reason why, having regard to the authorities cited, we should not hold that under the circumstances the plaintiffs were bound by the notice of these proceedings under S. 145. If all persons are so bound who have had actual notice, though not parties to the order, as laid down in *In re Nathubhai Brijlal,*[1] and followed in this Court as stated above, it stands to reason that these plaintiffs who admittedly

1. (1909) 11 Bom, L.R. 377. 2 (1923) I.L.R. 45 A 306.

had notice of the proceedings should also be bound. There is the additional reason that their father had acquired the properties as manager of the family on their behalf and it seems only reasonable that the other members of the family should be bound. The plaintiffs must then fail on this point of limitation and the second appeal must be dismissed on that point.

The next question is whether plaintiffs are entitled to recover compensation from the 1st defendant now represented by respondents 20 and 21. The sale-deed under which the plaintiffs are said to have acquired title to these lands is Ex. A and is recited to be a deed of sale of inam grant land and zeroyati land. The vendor recites that there is a lease on the land in favour of the 2nd defendant for 8 years from 1907 to 1915. The document then goes on:

"Therefore you shall, subject to your continuing the cowle period in favour of the said Varahalu Raju *alias* Ramabhaddiraraju Garu and subject to your collecting from him in my stead, the cist at the rate of Rs. 75 payable each year, on the 30th of Makha Bahulam, for the four years from the fasli year 1321, according to the instalments settled in the said cowle, take possession of the said land and enjoy the same soon after the expiry of the 30th of Palguna Bahulam of the year Ananda (15th March, 1915), continuing his term until the close of the said cowle period."

This is said to be a covenant for possession and enjoyment after the period of the lease, but it turned out that the tenant had a right of permanent occupancy and the learned Advocate for the plaintiffs admits that his client was aware of the legal status as an occupancy ryot of the defendant at the time he entered into this transaction Ex. A and he also accepts the finding that he is an occupancy tenant. The District Judge found that the plaintiffs were aware of the nature of the tenure and were therefore not entitled to damages. The Subordinate Judge came to the same conclusion, but he put it on the ground that the plaintiffs had failed to obtain possession by coming to Court too late (*i.e.*, on the point of limitation); so that it was their own fault that they failed to obtain possession. The question is, did the plaintiffs fail to get possession owing to the representation of the defendants as contained in Ex. A? It is impossible to say that they did. This part of the case is outside the question of limitation, because being a registered document the plaintiffs have six years within which to sue. It may, of course, be said with reason that the possession that the plaintiff was to get under Ex. A after the expiry of the 2nd defendant's lease was something different from what he had up to the expiration of that lease. And it is perhaps possible to explain this difference by saying that after its expiry he would have been able to take

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advantage of the provisions of the Madras Estates Land Act with regard to enhancement of rent and so on. *Mahomed Ali Sheriff* v. *Venkatapathi Raju*[3] was cited to us for the proposition that mere knowledge on the part of the vendee of a defect in title of the vendor would not by itself defeat the vendee's right on the basis of a covenant implied by the Transfer of Property Act. This is not the only fact in this case, because here the plaintiffs' father was not only aware of the state of the defendant's title but knew that the covenant must be entirely ineffective. At the same time it is exceedingly difficult to say especially having regard to the plaintiffs' knowledge of the whole state of things at the time he entered into Ex. A that he has been damnified by the fact that after 1915 he has not been able to collect from the tenants more than Rs. 75 per annum, the rate stipulated in the lease of the 2nd defendant, Ex. B. The contract to give him possession and enjoyment has really become unenforceable either because the 2nd defendant has acquired occupancy rights by the enactment of the Madras Estates Land Act or by judicial decision. It seems to me that it would be very difficult for a jury or anybody sitting as a jury to assess any damages or at least anything more than mere nominal damages in favour of the plaintiffs for the breach of this covenant which as a matter of fact their father knew could never be carried out. Under the circumstances I am inclined to say that the plaintiffs are not entitled to any damages but at the same time I would give the other side no costs.

Respondents 11 to 14 are held in the judgment of the Subordinate Judge not to be necessary parties and it is difficult to see why they have been made parties to this second appeal. They are dismissed from the appeal with costs.

The Court-guardian Mr. Narayana Aiyangar for the 20th and 21st respondents has received Rs. 35 as his fees from the Registrar and has applied for some additional allowance. I think that an additional sum of Rs. 40 ought to be awarded to him. This sum is to be paid before decree is issued.

In the result, the Second Appeal is dismissed but without costs except as regards respondents 11 to 14 who will receive one set.

Wallace, J.

Wallace, J.—I agree and just wish to add my own view on the point whether the plaintiffs' suit is barred by Art. 47 of the Indian Limitation Act.

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3. (1920) 39 M.L.J. 449.

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The contention that it is not barred because the order under S. 145 of the Criminal Procedure Code was passed without jurisdiction seems to me untenable in this ... the decision of this Court itself in previous ... the order was with jurisdiction. The fact that the plaintiff was not a party to these proceedings and was not allowed to come on as a party cannot affect the jurisdiction of the order. Plaintiff then can only succeed in the face of Art. 47 if he can show that he is not a person bound by the order under S. 145 of the Criminal Procedure Code. His general argument is that as the proceeding under S. 145 is of the nature of a criminal proceeding, it can only bind the persons actually named therein, and that though Art. 47 lays down that the limitation period shall apply also to persons claiming under those who were bound, he is not claiming under his father but in his own right as a member of the same joint family of which his father was the manager. On his argument, therefore, he is neither a person bound by the order nor a person claiming under one who is bound by the order. The latter part of his argument may be conceded, the former in my view cannot. Without going into the general question whether an order under S. 145 of the Criminal Procedure Code is a judgment *in rem* and maintains a party found to be in possession as against all the world until he is ousted by an order of the Civil Court, I am clear that, where the manager of the joint family in his capacity as such is a party to the proceedings, the joint family as a whole is a party and the proceedings bind any member of the joint family in his capacity as such. The possession of the manager as such is the possession of the joint family, such possession as can in the nature of the circumstances be had If eventually the Civil Court declares that the joint family is entitled to possession, the manager would retain for the joint family the possession given to him by the Criminal Court, while if the Civil Court declared the other party entitled to possession, the manager could not possibly resist the decree and claim to remain still in possession on his own individual behalf. The real party to the criminal proceedings in such a case obviously is the joint family and not the individual person who happens to be the manager. If the appellant's view is accepted, the usefulness of the proceedings under section 145 will be greatly curtailed. While these proceedings are *quasi* criminal, they are also *quasi* civil and there can be no legal objection to the actual parties cited being repre-

Venkata-somaraju v. Varahala-raju.

Wallace, J.

sentatives of the others as in an ordinary civil case. In the present case there can be no doubt that the plaintiff's father was a party to the proceedings in his capacity as manager of the joint family of which the plaintiff is a member. The plaintiff was therefore represented in the proceedings by the manager of his family, and as the manager is bound, equally is he bound. The appellant's learned advocate admits that he is not able to quote any reported ruling in his favour. There is a ruling to the contrary on the above lines in *Ram Sahai* v. *Binode Bihari Ghosh*,[2] I therefore agree that the appellant's suit for possession was rightly dismissed as barred by time.

N.S. *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Gade Govinda Rao Pantulu ...*Appellant* (Respdt. Plff.—Decree-holder)*

v.

Parankusam C. Jagannadham and another .. *Respondents (Applts. L.R. of 1st Deft. and 2nd Deft.).*

Govinda Rao Pantulu v. Jagannadham.

Madras Civil Courts Act (III of 1873), S 11 (2)—Constitution of Additional District Munsif's Court by notification of High Court—Local jurisdiction same as that of Principal District Munsif—Transfer of suit to Additional District Munsif for disposal—Proceedings of District Judge that the powers of Additional District Munsif ceased with the passing of the decree and thereafter the records should be returned to the Principal District Munsif's Court—Effect—Subsequent execution petitions in the Principal District Munsif's Court—If confers fresh starting points of limitation—Limitation Act, Art. 182

Where an Additional District Munsif's Court was sanctioned in 1911 under a notification of the High Court by which its local jurisdiction was fixed to be the same as that of the Principal District Munsif's Court, and in 1912 the District Judge of that place passed proceedings to the effect that the powers of the Additional Court over a suit transferred to it for disposal ceased when the decree was passed and that the record in each case disposed of should be sent to the Court from which the suit was transferred,

Held, that the proceedings of the District Judge must be taken to have in effect declared under the terms of section 11 (2) of the Madras Civil Courts Act of 1873 that the Additional District Munsif should not have jurisdiction in respect of execution matters, and therefore execution appli-

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*L.P.A. No. 220 of 1925 27th February, 1929.

2. (1923) I.L.R. 45 A. 306.

ations filed in the Principal District Munsif's Court, after the date of the District Judge's proceedings to execute the decree passed by the Additional District Munsif's Court would confer fresh starting points under Art. 182 of the Limitation Act.

Appeal under clause (15) of the Letters Patent against the udgment of the Hon'ble Mr. Justice Jackson, dated the 27th August, 1925 in Appeal against Appellate Order No. 76 of 1923 preferred against the order of the Court of the Additional Subordinate Judge of Ganjam at Berhampore, dated the 5th October, 1922 in A S. No. 134 of 1922 (A.S. No. 315 of 1920 on the ile of the District Court of Ganjam) preferred against the order of the Court of the Additional District Munsif of Berhampore in Execution Petition No. 79 of 1920 in Original Suit No. 273 of 1915.

C. S. Venkatachariar and *H. Suryanarayana* for appellant.

K. Bhashyam Aiyangar and *B. Jagannatha Das* for respondents.

The Court delivered the following

Ananta-krishna Aiyar, J.

JUDGMENTS. *Anantakrishna Aiyar, J.*—This Letters Patent Appeal arises out of an application for execution of the decree n O.S. No. 273 of 1915 on the file of the Additional District Munsif's Court at Berhampore. In Berhampore there existed at that time two District Munsifs' Courts, one called the Principal District Munsif's Court and the other the Additional District Munsif's Court, Berhampore. The latter Court seems to have been sanctioned in 1911 under a notification of the High Court. By this notification the Additional District Munsif's Court had jurisdiction throughout the Berhampore District Munsifi. The plaintiff filed his suit in the Court of the Principal District Munsif of Berhampore. It was transferred for disposal by the Additional District Munsif who gave a decree n plaintiff's favour. There was an appeal, in which also plaintiff succeeded. In 1912 the then District Judge, now Mr. Justice Kumaraswami Sastri, passed proceedings, dated 31st July, 1912. What exactly is the purport of the said proceedings is one of the points to be decided in this case. It runs as follows:—

"The notification R O C No 1108 of 1911 of the High Court is specific and directs the Additional Munsif to try only such suits as may be by general or special order transferred to it The Court has no power to receive plaints or applications except those specifically transferred When a suit which is transferred is disposed of, the Additional Court has no further power over it and the records must go back to the Court from which it is transferred, which alone has power to do anything further.

Govinda Rao Pantulu v. Jagannadham.

Anantakrishna Aiyar, J.

The powers of a Court have to be determined by the order constituting it and the limitations imposed by the order.

As I am of opinion that the powers of the Additional Court over a suit transferred to it for disposal cease when the decree is passed, the record in each case disposed of should be sent to the Court from which the suit was transferred as stated in paragraph 3 of the Berhampore Munsif's Court's (*sic*) letter."

The decree-holder filed successive applications for execution, within the period of limitation, before the Principal District Munsif of Berhampore. Finally he filed the present execution application—E P. No. 79 of 1920 in the Court of the Additional District Munsif of Berhampore. That application was resisted by the judgment-debtor on the ground that it was barred by limitation, the ground of objection being that the applications for execution filed in the Court of the Principal District Munsif were filed in a Court not having jurisdiction and consequently those applications could not be taken to be starting points for subsequent applications for execution. The District Munsif gave effect to this contention and dismissed the application on the ground of limitation. The decree-holder appealed and the Additional Subordinate Judge of Ganjam at Berhampore reversed the District Munsif's order and held that the application for execution should not in the circumstances be held to be barred by limitation. Against that decision, the judgment-debtor preferred C.M.S.A. No. 76 of 1923 to the High Court. That appeal came on for hearing before a learned Judge of this Court and he held that the Additional District Munsif's Court of Berhampore was the Court to which execution applications ought to be made and consequently the various applications for execution filed by the decree-holder in the Court of the Principal District Munsif of Berhampore could not prevent the running of limitation in this case. Against the judgment of the learned Judge, the decree-holder has preferred this Letters Patent appeal. It was contended on his behalf by Mr. C. S. Venkatachari, the learned advocate, who appeared for him, that the proceedings passed by Mr. C. V. Kumaraswami Sastri as District Judge in the years 1912 and 1919 respectively, printed at pages 1 and 2 of the printed papers, in effect declared under the terms of S. 11 of the Madras Civil Courts Act that the Additional District Munsif of Berhampore should not have jurisdiction in respect of execution matters. If we are able to agree with this argument of the learned advocate, then it is clear that the ground of the decision of the learned Judge of this Court and of the District Munsif, namely, that the present application is barred by

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR JUSTICE PAKENHAM WALSH.

Venkatarama Naidu .. *Petitioner* (Accused).*

Venkatarama Naidu, *In re*

Indian Penal Code (XLV of 1860), Ss. 116 and 161—Scope of—Offer of bribe to public officer who is functus officio*—Offerer or taker of bribe, whether guilty*

Where a person, in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio,* offers a bribe to him, he commits no offence by doing so and presumably the public officer would commit no offence by taking it

Necessity for amendment of section 161 of the Indian Penal Code by the Legislature pointed out by Coutts Trotter, C J

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the conviction and sentence passed by the Sessions Judge of West Tanjore at Tanjore in C.A. No. 43 of 1927 preferred against the judgment of the Court of the Sub-divisional Magistrate of Tanjore in C.C. No. 64 of 1927.

K. P. Ramakrishna Aiyar for petitioner.

K. N. Achari for *The Public Prosecutor* on behalf of the Crown.

The Court delivered the following

Coutts Trotter, C. J

JUDGMENTS. *The Chief Justice.*—This man was convicted and fined under the joint effect of sections 116 and 161 of the Indian Penal Code in the following circumstances. He was anxious to become a policeman and by the orders of the District Superintendent of Police he presented himself before the Reserve Inspector who found that he was below the minimum height accepted for the Police and rejected his application He thereupon tendered a five rupee note to the Officer, no doubt in the hope that the Officer would reconsider his decision and make a report to the District Superintendent of Police to that effect. The Officer had the man charged. He was convicted and he appeals.

The law relating to what I may shortly call bribery under the Penal Code is very curious. It is confined in effect to public servants or those who regard themselves as on the way to public service and the operative section 161 refers only to the taker and not to the giver of the bribe, the latter of course being by far the worse of the two. The giver or the offerer of the bribe

*Cr Rev Case No 921 of 1928 Cr R.P. No 762 of 1928. — 9th April, 1929.

Venkatarama Naidu, *In re.*

Coutts Trotter, C. J.

is only brought in under section 116, Indian Penal Code, by the doctrine of abetment. I think that the state of the law is very unsatisfactory. It seems absurd to say that a man abetted an offence which not only is not committed but with the whole transaction in relation to which he indignantly refused to have anything to do. By the cases in India, it is held that if the public officer has discharged his duty, whatever it may be, the person who attempts to bribe him, in circumstances such as the present, commits no offence whatever. I think this is the most unsatisfactory state of affairs, because it obviously leads to this, that if a man, in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio*, offers a bribe, he commits no offence by doing so and presumably the public officer would commit no offence by taking it. I think it is too late to go back on the decisions which have stood for a long time, but I do think that it is time that fresh legislation were introduced into the Code to make these most dangerous offences of giving or taking bribes punishable in much wider terms than are contained in the Code at present Moreover, there is no provision for the bribing of anybody except a public official and no provision at all corresponding to what is known in England as Fry's Act (Prevention of Corruption Act, 1906 VI Edw. 7 c. 34) It is obvious that it is possible for a man to give bribes to the agent, say of a rival trader to induce him to reveal his master's secrets, or for the agent to take such bribes for the purpose, and go unscathed, and I think it is eminently desirable that the giver or offerer of a bribe to a public servant should be rendered punishable by a much less circuitous method than he is at present.

In the result, the conviction must unfortunately be set aside and the fine, if paid, will be refunded. But I desire these observations be forwarded to the Government of India for their consideration.

Pakenham Walsh, J.

Pakenham Walsh, J.—I agree. As section 161 stands at present the decision that no offence can be committed when the public officer is *functus officio* appears to me to be correct.

N.S. *Revision Petition allowed.*

F. B.

Selvaranga Raju v. Doraiswami Mudaliar.

"non-compliance with the provisions of the Act or the rules made thereunder can only mean non-compliance by the officer whose duty it is to fix the date of election, receive votes and act as polling or returning officer"

In *Srinivasalu Reddi* v. *Kuppuswami Goundar*[4] Curgenven, J., held

"that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned, whether or not it be found necessary to take a poll"

He followed the view taken by Jackson, J., in *Srinivasachariar* v. *Venkatarama Aiyar*[6] and by Wallace, J., in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet.*[7] Madhavan Nair, J., agreeing with Curgenven, J., adopted this broader meaning of the term "election" as against the more restricted one which he had taken in *Krishnasamy* v. *Ghulam Muhammad Ghouse*[8] with Phillips, J. However, on this point it has been argued by the learned advocate for the petitioner that Devadoss, J., did not really say anything more than that the rules framed for election covered only the points which he mentioned. It is not disputed that, these rights having been created by a statute, there is no remedy outside the statute and, if the petitioner has no other remedy than an objection to the nomination at the time and an appeal to the Local Government together with any remedies he may have under section 51 and section 314 there is no further remedy. To my mind, the strongest reason given for his opinion by my learned brother Devadoss, J., is the possibility of a conflict of decisions. It is clear that, as stated above, section 51 must apply, as it purports to do, to the disqualifications both under section 49 and section 50. It applies therefore to the disqualifications of a candidate. If an election petition to the Subordinate Judge lies under the election rules and also a petition by a fellow Councillor under section 51 to the District Judge, it follows that there may be a conflict of decisions. Personally I am inclined to the view taken by Devadoss, J, rather than to that taken by Ramesam, J. But the matter being one of great importance in which it is desirable that there should be an authoritative decision, I would request that a reference may be made either to a Bench of two Judges or to a Full Bench as his Lordship the Chief Justice may think fit. The point for reference is:

"Can a disqualification under section 49 or section 50 of an elected candidate be a ground for a petition impugning the election under R 1

4 (1927) 27 L.W. 362 6 (1924) 47 M.L.J. 762
7. (1923) 45 M.L.J. 23 8 (1926) 51 M.L.J. 193.

F. B.

Selvaranga Raju v. Doraiswami Mudaliar.

and R 11 (c) of the rules for the decision of disputes as to the validity of an election held under the Madras Municipalities Act, 1920, or is the remedy confined to that prescribed in section 51 and section 314 of the said Act?"

The Chief Justice.—Put before a Bench of three Judges.

K. Bhashyam Aiyangar for petitioner.

T. M. Krishnaswami Aiyar and *T. E. Ramabhadrachari* for respondent.

The Full Bench expressed the following

Coutts Trotter, C.J.

OPINION. *The Chief Justice.*—The facts of this case are fully set out in the referring judgment of Mr. Justice Pakenham Walsh. The question is whether a disqualification on nomination on the ground that at the time of nomination the petitioner was an Honorary Magistrate of the Saidapet Bench Court and thus disqualified under section 49 (2) (*iv*) of the Madras District Municipalities Act of 1920 forms a ground for an election petition or can only be dealt with under section 51. My view of section 51 is that it can only apply where there has been an election of the candidate as a councillor which is apparently valid on the face of it. In my view it cannot apply to the inchoate stage of nomination which has not resulted in at least something which purports to be an election. Moreover, so far as I can see, no person except a councillor could take action before the District Judge against the person suggested to be disqualified. I see no option but to come to the conclusion that this cumbrous machinery leaves the result that an election petition is open to those entitled to launch it in order to raise this ground of disqualification.

Wallace, J.

Wallace, J.—The short question for decision here is whether an elector in an election held under the Madras District Municipalities Act of 1920 can, in an election petition before the Subordinate Judge or District Judge, urge, as a ground for setting aside the election, that the elected candidate was disqualified under section 49 or section 50 of the Act, or can this matter be moved only by a councillor or by the Chairman under section 51 and before the District Judge alone.

As usual, the Act fails to indicate clearly the answer to be given. The wording of section 51 is unhappy. It is not said who are the persons who may allege that the elected councillor is disqualified or in what form or manner the allegation is to be made, or how or when the person challenged is called on to admit or not to admit the allegation. Again, the present tense

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Selvaranga Raju v. Doraiswami Mudaliar.

Anantakrishna Aiyar, J.

view it is not a proper answer to say that it is open (1) to a Councillor to take action under section 51 of the Act, and (2) to the Chairman in charge of the nomination proceedings to solicit orders from the Government. It is clear that a *rival candidate* who would be entitled to be declared elected if the returned candidate be held to be disqualified under section 49 of the Act could not have his proper rights secured to him, unless such a matter could be inquired into by means of an 'election petition'. I am not satisfied with the argument advanced in support of the other view, namely, that though rights are created in voters and rival candidates, yet it should be taken that the legislature took the view that because remedies are made available to Councillors, therefore it could not be said that injustice is done to *voters* or *rival candidates*. If the rules permit of such an interpretation, I think we should construe the rules as providing for the enforcement by persons themselves of rights conferred on them by Statutes. The policy generally adopted in such cases seems to be to have such disputes decided by means of an 'election petition,' and I think the rules on a proper construction bear out that view.

In this view, there would be no conflict of jurisdictions, nor would there be cases of existence of bare rights in persons but without there being available to them any remedies to enforce the same.

My answer to the question is that a disqualification under section 49 could be made a ground for a petition impugning the election under Rule 1 and Rule 11 (*c*) of the rules for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act of 1920.

N.S. *First part of the reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

The Municipal Council, Kumbakonam .. *Appellants**

v.

The South Indian Railway Co., Ltd. .. *Respondents.*

Municipal Council, Kumbakonam v. S. I. Railway Co., Ltd.

Madras District Municipalities Act (V of 1920), Schedule IV, Rr. 8 and 15—Assessment to tax—Amendment of assessment so as to operate retrospectively—Validity

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*L.P.A No. 118 of 1926. 18th April, 1929.

Municipal Council, Kumbakonam v. S. I. Railway Co., Ltd.

Under the Madras District Municipalities Act an amendment of an assessment to tax can be made at any time within three years so as to operate retrospectively.

On appeal from the decree of the Hon'ble the Chief Justice, dated 12th March, 1925, passed in the exercise of the Extra-ordinary Original Civil Jurisdiction of this Court in C.S. No. 284 of 1924.

K. Bhashyam Aiyangar for appellants.

R. N. Aiyangar instructed by *Messrs. King & Partridge* for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—In this case, the Municipal Council of Kumbakonam assessed the South Indian Railway Company for the year 1921-22 on a certain footing. The tax imposed was Rs. 632-14-6. A demand notice for this amount was sent on 31st July, 1921 and the amount was paid. A foot-note to this demand notice mentioned the fact that the demand was provisional and was "subject to revision under proviso (*a*) to section 82 (2) of Act V of 1920 on receipt of particulars from the Executive Engineer *re* present estimated cost of erecting the building." It may be mentioned that proviso (*a*) to section 82 (2) of Act V of 1920 really indicates the mode of assessment. It does not relate to any power of revision. Such power is really contained in Rule 8 of Schedule IV attached to the Act. This rule says that the Chairman may amend the assessment books at any time by altering the amount of tax. In February, 1923, the Chairman amended the tax and sent a communication to the Railway Company informing them of the altered assessment and also stating that the altered assessment would take effect from 1st April, 1921. The question now in this case is, whether the amendment made in 1923 can be so made as to operate from 1st April, 1921. Rule 15 of Schedule IV says:

> "When the Chairman has amended the assessment books of his own motion, otherwise than in the course of a general revision under Rule 8, the amendment shall be deemed to have effect from the earliest date in which the circumstances justifying the amendment existed in the year to which the orders have reference."

The orders mentioned in this rule are the orders of amendment, the year to which the orders have reference is 1921, beginning from 1st April, and the earliest date on which the circumstances justifying the amendment existed in the year would be 1st April, 1921. Therefore, so far as Rule 15 of Schedule IV is concerned, there is nothing in it to prevent an amendment in

1923 of an assessment made in 1921 and Rule 8 itself says that the amendment may be made at any time. No doubt, the result of the consideration of these rules looks as if an amendment may be made, "perhaps, years after," as the learned Chief Justice observes. Our attention has been drawn by the learned advocate for the appellants to section 345. Under this section, it appears that an amendment made more than three years after the year for which it was intended to have effect is useless and cannot be carried into operation. If this construction of section 345 is not correct, it may be that there is no limit of time to the orders and the mode of assessment. As the rules and the Act stand, there can be no doubt that the amendment of an assessment can be made at any time within three years so as to operate retrospectively. As to the inconvenience to big concerns like Railway Companies which have to produce a balance sheet and declare dividends, inconvenience may exist; but, in the face of the section and the rules, the inconvenience cannot prevent the operation of the Act and the rules thereunder. We, therefore, allow the appeal and dismiss the suit with costs throughout.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE KRISHNAN PANDALAI.

C. Gajapathi Naidu and two others .. *Plaintiffs* *

v.

Jeevammal *alias* Padmavathi Ammal and twenty others .. *Defendants.*

Hindu Widows' Re-marriage Act (XV of 1856), S 2—Hindu caste where re-marriage of a widow is permissible—Applicability—Custom permitting a widow to retain her first husband's estate after re-marriage—Validity.

Section 2 of the Hindu Widows' Re-marriage Act applies also to Hindu castes in which widow re-marriage is permissible and a custom permitting the retention, by the re-marrying widow, of her estate in her first husband's property after re-marriage cannot be pleaded in the face of the express statutory forfeiture of such estate enacted by the section

Case-law reviewed

S. Duraiswami Aiyar and *P. V. Vallabhacharyalu* for plaintiffs.

K. S. Krishnaswami Aiyangar for *T. Krishnaswami Aiyar, M. Subbaroya Aiyar, K. Muthuswami Chettiar, T. K. Srinivasa*

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*C.S. No 417 of 1927. 29th July, 1929.

Gajapathi Naidu v. Jeevammal.

Thathachariar, S. Srinivasaraghavan, G. Ramakrishna Aiyar, P. Chakrapani Aiyangar, N. K. Tirumalachari and *K. E. Rajagopalachariar* for defendants.

The Court delivered the following

JUDGMENT.—The third issue has been set down for trial as a preliminary issue. It is as follows:—

3. Even if there be one (*i.e.*, a custom in the family permitting re-marriage), does such a custom override the provisions of the Hindu Widows' Re-marriage Act and is the 1st defendant entitled to retain the properties?

The facts on which this issue has to be determined can be gathered from the pleadings. The plaintiffs and 1st defendant are Naidus by caste and the plaintiffs claim to be the nearest reversioners of 1st defendant's first husband, the deceased Madanagopal Naidu, whom she married in 1910 and who died issueless in April, 1915. The suit is for possession of the immoveable properties mentioned in A schedule which are admittedly properties which 1st defendant inherited from her first husband. Plaintiffs allege that there were other properties but that is disputed and this question is dealt with in the other issues. The 1st defendant who was a minor at the date of her first husband's death re-married one Padmanabham Naidu in 1923. This is admitted. It was stated at the bar by plaintiffs' advocate that the re-marriage was under the Special Marriage Act, 1872, but the 1st defendant's advocate was not prepared to admit this. The plaintiff alleges in paragraph 11 of the plaint that the 1st defendant belongs to a caste or community in which widow re-marriage is not permitted by law or custom. But the 1st defendant in paragraph 14 of her written statement alleges that widow re-marriage is permitted in her caste and explains this by adding that the caste originally migrated into British India from the Nizam's Dominions. The 8th defendant makes a similar allegation as to custom in paragraph 9 of his written statement. The question of custom raised as above is covered by the second issue where it is referred to as a custom in the family. The third issue above set forth arises upon the plaintiffs' contention that assuming that there is such a custom, it cannot be proved as it is overriden by the language of S. 2 of the Widows' Re-marriage Act XV of 1856; in other words, that the forfeiture enacted by that section applies even to communities in which widow re-marriage was, or is, by custom permissible. This is the real question for determination on this issue.

Gajapathi Naidu v. Jeevammal.

There is no direct authority in our Court on the point, hough questions more or less cognate to the present have been iscussed. In *Murugayi* v. *Veeramakali*[1] a re-married widow f the Maravar caste, in which widows may re-marry, was held lisentitled to claim the property of her first husband. Their ordships said:

"Although it has often been doubted whether people of the class of hese contending parties are strictly speaking Hindus, there can be no uestion that in their customs and observances they are mainly governed y the Hindu Law Among them widows may re-marry, and in this respect heir customs differ from those of the Hindu Law as understood to be inding upon the higher castes in the present day Their law of inherit- unce of property and of the right of the widow of a man who has left o male issue to a life-interest in it is the Hindu Law and it must be as- umed that they are in such matters guided by the principles of that Law, owever much it may be relaxed in reference to some of their social isages"

Then their Lordships refer to the custom as re- corded in Steele's "Hindu Castes" that it is the ractice of a wife or widow among the Sudra castes of the Deccan on re-marriage to give up all property o her former husband's relations except what has been given her by her own parents and state that the law in this Presidency is the same. Though this decision does not refer to he Widows' Re-marriage Act of 1856, it has been followed ever since not only in this Court but by other High Courts also and establishes that though there are numerous Hindu castes in which widows do re-marry, such widows cannot as a conse- quence of Hindu Law which defines the essential nature of a widow's estate in her husband's property, hold that husband's property after re-marriage with another man—see *Sreeramulu* v. *Kristamma*[2]. In *Vitta Tayaramma* v. *Chatakondu Sivayya*[3] the question arose of a widow who had been a Hindu but be- came a convert to Islam and then re-married a Mahomedan and claimed to retain the deceased Hindu husband's property. The question "Does a Hindu widow who becomes a Mahomedan and marries a Mahomedan by her re-marriage forfeit her interest in her first husband's estate" was referred to a Full Bench and it was held by a majority that she does. The ground on which the majority whose opinion forms the decision agreed is that quite apart from the effect of section 2 of the Widows' Re- marriage Act, the rule of Hindu Law is that a Hindu widow

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1 (1877) I L.R. 1 M 226.
2 (1902) I.L.R. 26 M. 143 at 149. 12 M.L.J. 197
3. (1918) I.L.R. 41 M. 1078: 35 M.L.J. 317 (F.B.).

Gajapathi Naidu v. Jeevammal.

who re-marries cannot hold after re-marriage the estate of her first husband—and this even in castes which by custom permit re-marriage—*see* per Wallis, C. J., at page 1090 and *per* Oldfield, J., at page 1093. But as to the construction of that section while Wallis, C. J., was prepared to hold that it applied also to Hindu widows re-marrying after conversion to another religion, Oldfield, J., was of opinion that such cases are outside the scope of that section. It will be noted that the question which the members of the majority had before them and on which they differed was the applicability of section 2 of this Act to an apostate Hindu widow re-marrying after apostacy. That is not the present case. The other learned Judge differed from both his colleagues on the question of Hindu Law and from the Chief Justice on the applicability of the section to the case. The case is thus not an authority on the question of construction which arises in this case, *i.e.*, whether section 2 of the Widows' Re-marriage Act is applicable to Hindu castes in which the custom of re-marriage is prevalent, but it establishes another illustration of the proposition that the estate of a Hindu widow who re-marries is lost by the re-marriage.

The construction of the section in question has come before the Calcutta, Bombay and Allahabad High Courts. The decision in *Matungini Gupta* v. *Ram Rutton Roy*,[4] though not on the precise point whether section 2 applies to Hindu castes in which widow re-marriage is permitted, proceeds on the footing that that question can be answered only in the affirmative. There a Hindu widow Harani married again a second husband under the Special Marriage Act (III of 1872) after making the declaration which was at that time necessary under S. 10 that she did not profess the Hindu religion. (No such declaration is now necessary, *see* Act XXX of 1923.) In his referring judgment Wilson, J., says at page 294:

"It appears to me that each of these sections, *viz*, 1 and 2, applies to the whole class of widows to whom the Act is applicable I think further that each section applies to a Hindu widow from the time she becomes a widow so that section 1 makes her free to marry again if she pleases and section 2 declares one of the conditions on which she takes the estate."

In the argument before the Full Bench the learned vakil for the plaintiff drew attention to the fact that the custom existed among the lower castes all over the country by which re-marriage was allowed and that even in such castes the re-marrying widow forfeited by ordinary Hindu

4. (1891) I.L.R. 19 C. 289 (F.B.).

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:o repeat them. It is sufficient to say that if the rule of the general Hindu Law is as it has been held to be that even in :ases of castes permitting re-marriage the re-marrying widow 'orfeits her interest in her first husband's property, the legisla-:ure must have had this clearly before it when enacting Act XV of 1856. This is also apparent from the first paragraph of he preamble where exceptions to the rule prohibiting re-mar-iage are expressly referred to. When, therefore, with this fact before it, the legislature enacted section 2 by which Hindu vidows on re-marriage are declared to forfeit their interests in heir first husband's property, no new penalty or disability was being enacted, but statutory sanction was being given to what vas then known to be the general Hindu Law. In short, vhat had been the general unwritten law of the Hindus vas converted into an express and statutory enactment. On he question of construction therefore I am clearly of opinion hat assuming that the first defendant belongs to a caste where vidow re-marriage is permissible, her case would be within the 'orfeiture enacted by section 2

The question then is whether the custom pleaded can over-ide that enactment. As pleaded by the first defendant in her own written statement the custom merely permits re-marriage of widows. There is no averment that it is also customary for re-marrying widows to retain their estate in their first hus-band's property after re-marriage. The 8th defendant, however, has pleaded that the custom permits such retention for the period of the re-marrying widow's natural life. For the pur-pose of deciding this preliminary issue this may be taken to be the plea of the 1st defendant also. The question is whether such a custom can be pleaded in the face of the express statutory forfeiture enacted by section 2. In my opinion, it cannot; be-cause no plea of custom can prevail to violate an express statu-tory enactment to the contrary and any custom repugnant to such enactment will be held to have been swept away thereby. On this point *see* Halsbury's Laws of England, Vol. 10, sections 460 and 461 where the cases will be found collected. I need not repeat the ground for holding that the words of section 2 are general and embrace all Hindu widows, *i.e.*, persons who become widows when they are Hindus and that the section is not confined, by anything to be inferred from the preamble, to such castes among the Hindus as did not permit re-marriage by custom. I refer to the reasons stated in *Vithu* v. *Govinda*,[7]

7 (1896) I.L.R. 22 B 321 (F.B.).

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including the rule of construction that the preamble to the Act does not indicate the intention of the legislature to control its express enactments even if it could legitimately be used for that purpose which cannot generally be done. Section 2 thus lays down as an express enactment applicable to all Hindu widows what was then known generally to be the law applicable to all Hindus that a re-marrying widow shall upon re-marriage cease to have any interest in her first husband's property which she had as such widow either by inheritance, maintenance, or by will, and that the next heir of her deceased husband shall thereupon succeed to the same. After such an express enactment, express both in its deprivation and in its conferment, it is, I think, impossible to contend that any custom permitting a re-marrying Hindu widow to retain her first husband's property was or could be saved. I, therefore, hold on the preliminary issue that the custom pleaded by the 1st and 8th defendants is, even if true, overriden by statute and therefore cannot be proved.

N.S. *Preliminary issue decided.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

The Maharaja of Pittapuram .. *Appellant in all the the Appeals (Defendant).*

v.

Sri Chelikani Venkatarayanim Garu .. *Respondent in all the Appeals (Defendant).*

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Court Fees Act, Sch II, Art 17 (b)—Madras Estates Land Act, S 95—Suit by ryot to set aside distraint proceedings—Dismissal of suit—Appeal by ryot—Declaration by the Appellate Court that distraint was valid only in part as the whole of the rent stated in the demand was not legally due—Appeal by landlord—Memorandum of objections by ryot only attacking the finding of the Lower Appellate Court as to the amount of rent legally due—Court-fee payable—Power of Court to declare distraint valid in part

Certain ryots instituted suits under section 95 of the Madras Estates Land Act to set aside distraint proceedings on the ground that proper notice was not served upon them and that the amount of rent due was wrongly stated in the demand The Trial Court dismissed the suits and the ryots appealed The Appellate Court came to the conclusion that the amount of rent due was not what was stated in the demand, but only about half of that and modified the decree of the Trial Court by declaring that the distraint made by the landlord was not wholly void but was valid only to the extent of the amount of rent found by it to be due to the landlord The landlord preferred second appeals to the High Court against these decrees. The ryots filed memoranda of objections in each of the second appeals These memoranda of objections did not contain

*S R. Nos. 18337 to 18340 of 1928. 18th July, 1929.

any ground which went to impugn the distraint proceedings *in toto* but each one of the grounds taken only attacked the finding of the Lower Appellate Court as to the exact amount of the rent due to the landlord

Held, that the subject-matter of the memoranda of objections was capable of being estimated in money value within the meaning of Clause 17 (*b*) of Schedule II of the Court Fees Act and, consequently, the Court-fee payable was not the fixed fee of Rs. 15 but an *ad valorem* fee on the value of each of these memoranda It is open to Courts to declare a distraint made by a landlord under the provisions of the Madras Estates Land Act valid in part and invalid in part.

Raghunatha Row Sahib v Vellayunoonji Goundan, (1914) 38 M 1140: 27 M L J. 597 referred to.

Memoranda of Objections in Second Appeals Nos. 141 to 144 of 1928 against the decrees of the District Court of East Godavari at Rajahmundry in Appeals Nos. 261, 263, 262 and 264 of 1925 preferred against the decrees of the Court of the Deputy Collector, Headquarters Division, Cocanada, in Land Suits Nos. 1, 7, 6 and 8 of 1925.

P. Satyanarayana Rao for respondent.

The Government Pleader for the Crown.

The Court delivered the following

ORDER —The question that has been referred to me is, what is the Court-fee payable in respect of the memoranda of objections in Second Appeals Nos. 141 to 144 of 1928. The original suits were instituted by ryots under S. 95 of the Madras Estates Land Act. In the plaint there are distinct allegations to the effect that proper notice was not served on the ryots and that the amount of rent due was wrongly stated in the demand. The first Court dismissed the suits filed by the ryots, but on appeal by the ryots the Lower Appellate Court came to the conclusion that the amount of rent due was not Rs. 4,000 and odd but only Rs. 2,000 odd. Accordingly, the Lower Appellate Court reversed the decrees passed by the first Court dismissing the suits, and in modification of the said decrees declared that the distraint made by the landlord was not wholly void but was valid only to the extent of Rs. 2,000 odd, the amount of rent found by it. The landlord has preferred these Second Appeals Nos. 141 to 144 of 1928. The ryots, who are the respondents, have filed memoranda of objections in each of these second appeals; and the question that has been referred to me is, as I have already stated, what is the proper amount of Court-fee payable in respect of these memoranda of objections.

In order to find out what exactly is the amount of Court-fee payable in respect of a document, one has to see, first of all,

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what the exact nature of the document is. I have read through these memoranda of objections and I am not able to find any ground which goes to impugn the distraint proceedings *in toto*; on the other hand what I find is that each one of the grounds taken in the memoranda only attacks the finding of the Lower Appellate Court as to the exact amount due to the landlord. Thus my decision is confined to a case where it is not the whole of the distraint that is sought to be set aside by virtue of some plea which goes to the root of the whole matter; in the present cases the objection taken by the ryots to the decree of the Lower Appellate Court is confined, as I understand the same, to the question of the amount of rent due Therefore the question that I have got to ask myself is this: Is the subject-matter of these memoranda of objections capable of being estimated in money value within the meaning of clause 17 (*b*) of Schedule II of the Court Fees Act. Before I consider this question, it may perhaps be convenient that I should refer to one or two sections of the Estates Land Act which deal with the question as to how far distraint proceedings could be held to be partly valid and partly invalid. Section 53 (2) enacts that a patta tendered by a landholder which in the opinion of the Collector is partially but not entirely correct shall nevertheless be enforceable to the extent to which it is found to be correct. Reference was made by the learned Government Pleader to S.104 also of the Estates Land Act in this connection. The learned Advocate who appeared for the ryots argued that clause (2) of section 53 would apply only to suits for acceptance of pattas and muchilikas and that the section could not apply to suits such as these I have now to deal with, namely, suits brought under section 95 to set aside distraint proceedings. I find on a reference to the case of *Raghunatha Row Saheb* v. *Vellamoonji Goundan*[1] that this very question came up for consideration before two learned Judges of this Court, Oldfield and Seshagiri Aiyar, JJ., and both of them came to the conclusion that the application of the section was not confined to patta suits as is now contended for by the learned Advocate on behalf of the ryots. I need not go into the details of the reasoning of the learned Judges, for the said decision is binding upon me. It was held in that case that a distraint could be upheld to the extent of the amount legally due to the landlord though the landlord purported to effect the distraint in respect of a larger amount. This is a decision under the present Estates Land Act, and consequently

1 (1914) I L R 38 M 1140: 27 M L J. 597.

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is a direct authority on the construction of the section in question. I may just quote one sentence from the judgment of Seshagiri Aiyar, J., at page 1143 of the report:

"It would serve," His Lordship says, "no purpose therefore to enact in clause (2) of section 53 that the landlord can enforce his claim for rent in a Revenue Court in so far as the patta correctly states it. If the decisions prior to the Estates Land Act can furnish any assistance, I feel no doubt that they would support this conclusion of mine. Prior to the passing of the new Act, the predominant view was that a distraint for an excess amount should not be avoided altogether."

Before the Estates Land Act no doubt there was some difference of opinion on this particular point but as remarked by Seshagiri Aiyar, J., the predominant view was that a distraint would be valid to the extent of the rent properly due. In *Venkatakrishna Pillai* v. *Muthialu Reddy*[2] Sir Arnold White, Chief Justice, and Krishnan, J., say as follows:—

"It is argued that the attachment is bad as it was for a larger amount than what the District Judge held to be due. It has been held by this Court in recent cases that the attachment is good for the amount actually due. A case of sale stands on a different footing from a case of attachment. The case before us is only one of distraint, not of sale."

The learned Judges held that the distraint was valid to the extent of the proper amount of rent due. A similar view was also taken in *Bhupatirazu* v. *Ramasami*,[3] where the distraint was made in respect of a sum of Rs. 44-6-0, whereas the amount due was only Rs. 22-3-0, just half the amount claimed by the landholder; and the Court held that the distraint was valid to the extent of Rs. 22-3-0 found by the Court to be properly due.

Having regard to the predominant view that prevailed in Madras prior to the enactment of the Estates Land Act and having regard to the decision in *Raghunatha Row Saheb* v. *Vellamoonji Goundan*[1] on section 53 of the present Act, there could be no doubt on the question that it is open to Courts to declare a distraint valid in part and invalid in part. The decree of the Lower Appellate Court, in the cases before me, as I have mentioned already, declared the distraint to be valid to the extent of Rs. 2,000 odd. It is against such a decree these memoranda of objections have been filed, and as the memoranda raise no question that goes to the root of the whole matter and render the whole distraint invalid, and since the grounds raise only questions as regards the exact amount of rent due, I think that the present is a case which does not come within clause 17 (*b*) of Schedule II of the Court Fees Act. The conclusion I have

1. (1914) I.L.R. 38 M. 1140: 27 M.L.J. 597.
2. (1910) 20 M.L.J. 821.
3. (1900) I.L.R. 23 M. 268.

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come to is that it is possible to estimate at a money value the subject-matter in dispute in these memoranda of objections. On the side of the Crown my attention was also drawn to clause 8 of section 7 of the Act where the legislature deals with suits to set aside attachment of lands as capable of being so valued. The case in *Bunwari Lal* v. *Daya Sunker Misser*[4] was also quoted as throwing light on the question as to what exactly is the meaning to be attached to the words "capable of being estimated in money value" occurring in clause 17 (*b*) of the Court Fees Act.

For the reasons I have mentioned, I have come to the conclusion that the memoranda of objections in the cases before me are capable of being estimated in money value, and consequently the Court-fee payable in respect of the same is not the fixed fee of Rs. 15 but an *ad valorem* fee on the value of each of these memoranda. The learned Advocate for the ryots will be called to specify the value of these memoranda and pay *ad valorem* fee thereon within a month.

N.S. *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE RAMESAM AND MR. JUSTICE REILLY.

Immidisetti Dhanaraju and others .. *Appellants** (*Judgment-debtor and Counter-petitioner*)

v.

Motilal Daga, trading under the name and style of Balakrishnadas Motilal and others .. *Respondents* (*Decree-holders—Petitioners*).

Letters Patent (Madras), clause 36—Civil Procedure Code, S. 98—High Court—Equal division of opinion between the Judges—Procedure to be followed.

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The procedure to be adopted by the High Court in case of an equal division of opinion between the Judges should be governed by clause 36 of the Letters Patent and not by S. 98 of the Civil Procedure Code

Bhaidas Shivdas v. *Bai Gulab*, (1921) L.R. 48 I.A. 181. I.L.R. 45 Bom 718. 40 M.L.J. 519 (P.C.) relied on.

Venkatasubbiah v. *Venkatasubbamma*, (1924) 21 L.W. 721 overruled.

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*A.A.O. Nos 78, 155 and 403 of 1926 19th February, 1929.

4. (1909) 13 C.W.N. 815.

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Appeal against the order of the Court of the Subordinate Judge of Cocanada, dated 16th November, 1925 and made in E. P. No. 102 of 1925 in O.S. No. 67 of 1922.

Two persons were carrying on a business in partnership with three others. To contribute their share of the capital and of the working expenses for that business, they borrowed various sums of money from two strangers. When pressed to repay these amounts, these two partners executed a mortgage in favour of the two creditors of their interests in the partnership. Later on, these two partners instituted a suit O.S. No. 9 of 1922 on the file of the Subordinate Judge of Cocanada for the winding of the partnership and taking the necessary accounts. Subsequently, the mortgagees instituted a suit O.S. No. 67 of 1922 on the file of the Subordinate Judge of Cocanada to enforce the mortgage and in this suit they impleaded the other three partners also as defendants. The latter suit was decreed first, the decree being against the mortgagors and the other partners being exonerated. This decree was held to be a money decree and not a mortgage decree. Subsequently, in O.S. No. 9 of 1922 a preliminary decree was passed declaring who the partners were and the extent of the interests of the plaintiffs in that suit in the partnership. Thereupon, the decree-holders in O.S. No. 67 of 1922 applied for execution of their decree and prayed for the sale of the share of their judgment-debtors in the partnership. Objection was taken to this sale but it was overruled and the sale was held. An application to set aside the sale also was dismissed. Appeals were preferred to the High Court against these orders of the Subordinate Judge of Cocanada passed in execution of the decree in O.S. No. 67 of 1922 and were heard by Phillips and Tiruvenkatachariar, JJ. Phillips, J., held that the order of the Subordinate Judge directing the sale and its subsequent sale were illegal and should be set aside. Tiruvenkatachariar, J., held that the order of the Subordinate Judge was correct. The question arose as to what was the proper order to be passed in view of this difference of opinion between the two Judges.

T. M. Krishnaswami Aiyar for appellants.

K. S. Krishnaswami Aiyangar and *C. Rama Rao* for respondents.

The Court (Phillips and Tiruvenkatachariar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH. *Phillips, J.*— Owing to the difference of opinion between my learned brother and myself, there remains for decision the question whether the

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provisions of section 98 of the Civil Procedure Code or the provisions of clause 36 of the Letters Patent should be applied. A similar provision to that contained in section 98 was first enacted in 1861 by an Act amending the Civil Procedure Code of 1859. Subsequently in 1862 Letters Patent were issued establishing the High Court of Madras and these Letters Patent were modified in 1865. Clauses 15 and 16 of the Letters Patent conferred appellate jurisdiction on the High Court and in clause 36 it is declared that in the exercise of appellate jurisdiction a certain procedure is to be adopted. That this overruled Act XXIII of 1861 was held in *Nundeepal Mahta* v. *Mr. Alexander Shaw Urquhart*,[1] where it was held by the Calcutta High Court that both clause 15 and clause 36 of the Letters Patent prevailed over the previous Act of 1861. In 1877 the Civil Procedure Code was again amended and also in 1882, and in neither of these Acts is there any section providing that the Code shall not affect the Letters Patent. It has accordingly been held that under the Code of 1882, section 575 supersedes the provisions of the Letters Patent so far as clauses 16 and 36 are concerned but not in the case of clause 15. The latter point was decided by the Privy Council in *Hurrish Chunder Chowdhry* v. *Kalisundari Debi*,[2] but there has been no pronouncement by the Privy Council on the former point. In *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami*,[3] *Appaji Bhivrav* v. *Shivlal Khubchand*[4] and *Hussaini Begam* v. *The Collector of Musaffarnagar*[5] and other cases to which I need not refer in detail, it was held that section 575 (of Act XIV of 1882) supersedes clause 36 of the Letters Patent. When the Code of 1908 was enacted, a provision was inserted, *i.e.*, section 4:

> "In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force."

Notwithstanding this provision it has consistently been held that section 98 of that Code overrides clause 36 of the Letters Patent—vide *Bhuta* v. *Lakadu Dhansing*[6] and many other cases in each Court. There is one exception to this series of cases, namely, *Veeraraghava Reddi* v. *Subba Reddi*,[7] where it was

1 (1870) 13 W R 209 2 (1882) L R. 10 I A 4. I L R 9 C 482 (P C.)
3 (1884) I L.R. 10 C 814 (F.B) 4. (1879) I L.R 3 B 204 (F B)
5. (1889) I L.R. 11 A. 176. 6 (1918) I.L.R. 43 B. 433 (F.B.).
7 (1919) I.L.R. 43 M 37: 37 M.L.J. 449.

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the Code of 1908, applied only to appeals to the High Court from Subordinate Courts, and that in *Sabapathy Chetti* v *Narayanasami Chetti*[17] the Court said that the provision made by section 15 of the Letters Patent was entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another, but both these cases followed and purported only to apply *Chappan* v *Moidin Kutti*,[8] a Full Bench decision of 1898 and *Toolsee Money* v. *Sudevi*.[18] These are cases in which the point actually decided was that the appeal expressly given by section 15 of the Letters Patent is not interfered with by section 588 of the Code of 1882 on the principle *generalia specialibus non derogant*, following *Hurrish Chunder* v *Kalisundari*.[2] From a consideration of these older cases, which were very fully argued and considered, it appears that the decisions in *Sabapathy Chetti* v. *Narayanasami Chetti*[17] and *Sesha Ayyar* v *Nagarathna Lala*[16] laid down their effect much more widely than was necessary and overlooked the distinction between rules which took away existing rights of appeal and rules which recognize these rights but regulate the procedure of the Court in which such appeals are pending. It is also plain that the words in section 104 of the Act of 1908 are inserted for the purpose of giving effect to the decisions of the Full Bench at Madras and of the High Court at Calcutta, for the excepting words 'save as otherwise expressly provided by any law,' cut down the general words, and thus carry out the very reasoning of those two judgments "

We see that Lord Sumner recites with approval *Chappan* v. *Moidin Kutti*,[8] which follows *Hurrish Chunder Chowdhry* v. *Kalisundari Debi*,[2] but held that the two subsequent cases *Sabapathy Chetti* v. *Narayanasami Chetti*[17] and *Sesha Ayyar* v. *Nagarathna Lala*[16] laid down the effect of the former cases much more widely than was necessary. In fact the general trend of the judgment is to show that the Civil Procedure Code is applicable to High Courts with the proviso that it does not affect any of the provisions of the Letters Patent. Immediately after this judgment, namely on 20th January, 1921, we have the decision in *Bhaidas Shivdas* v. *Bai Gulab*.[9] There it was held that in an appeal from the Original Side, clause 36 of the Letters Patent was not affected by section 98, Civil Procedure Code. It was no doubt observed:

"This view of the section is not novel, for it has been supported by the judgments in Madras, in Allahabad and in Calcutta, see *Roop Laul* v *Lakshmi Doss*,[19] *Lachman Singh* v *Ram Lagan Singh*[20] and *Nundeepat Mahta* v *Mr Alexander Shaw Urquhart*,[1]

but the decision in the judgment is not arrived at on the

1 (1870) 13 W.R. 209.
2 (1882) L R 10 I.A 4, I.L.R 9 C. 482 (P C)
8 (1898) I.L R. 22 M 68 8 M.L.J. 231 (F.B.)
9. (1921) L.R. 48 I.A. 181 I L R. 45 B. 718 40 M.L J. 519 (P.C.)
16. (1903) I.L.R. 27 M 121· 13 M L J 362
17. (1901) I.L.R 25 M 555: 11 M.L.J. 346.
18. (1898) I.L.R 26 C 361 (F.B.).
19. (1905) I.L.R. 29 M 1. 20. (1903) I.L.R. 26 A 10.

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same grounds but is based upon section 4 of the Civil Procedure Code of 1908, namely,

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force."

Lord Buckmaster then observes in *Bhaidas Shivdas* v. *Bai Gulab*[9]:

"There is no specific provision in section 98, and there is a special form of procedure which was already prescribed. That form of procedure section 98 does not, in their Lordships' opinion affect "

This is a very general statement and is wide enough to include the statement that section 98 does not affect the procedure laid down in the Letters Patent. That procedure is given in clause 36 which applies to cases arising both under clause 15 and clause 16. It would, therefore, appear that this dictum would apply equally to clauses 15 and 16 of the Letters Patent and this is supported by the judgment of Lord Sumner in *Sabitri Thakurain* v. *Savi*,[10] where he observes:

"In conclusion, there is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters "

This is a very general pronouncement and supports the view that if the procedure under clause 36 is to be adopted in cases falling within clause 15, it should also be adopted in cases falling within clause 16.

It is quite clear that before 1877 the appellate procedure of this High Court was governed by clause 36 and not by the Procedure Code of 1859 as amended in 1861. This is clear from the decision in *Nundecput Mahta* v. *Mr. Alexander Shaw Urquhart*[1] The Codes of 1877 and 1882 being subsequent in date to the Letters Patent of 1865 may be held to have overruled the Letters Patent, for there is no provision in those Codes corresponding to section 4 of the present Civil Procedure Code and that was the view adopted by all the High Courts in India. The same view was taken even after the Civil Procedure Code of 1908 came into force, but reference is not made in any of the decisions to the effect of section 4 of that Code.

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1 (1870) 13 W.R. 209

9 (1921) L R 48 I A. 181 I.L.R 45 B 718 at 723: 40 M.L.J. 519 (P.C).

10. (1921) L R. 48 I A. 76 I L R 48 C. 481 at 492· 40 M.L.J 308 (P C).

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The effect of that section in one particular instance is clearly aid down in *Bhaidas Shivdas* v. *Bai Gulab*,[9] and that this effect should be held to be of general application is supported by the anguage of *Bhaidas Shivdas* v. *Bai Gulab*[9] and also the observations in *Sabitri Thakurain* v. *Savi*.[10] That this is the correct view is also supported by their recent amendment of section 98 which in terms says that section 98 shall not affect any provision of the Letters Patent. In the statement of objects and reasons is said that the object of this amendment is to enact more clearly the provision which was previously implied in section 4 of the Act. This seems to me to be clear proof that it was the intention of the legislature in making this amendment to declare that the procedure laid down in clause 36 of the Letters Patent should be generally applicable in all appeals heard by the High Court and was unaffected by section 98 of the Code.

It is suggested that the amendment of section 98 merely eaves the law as it was before, but as there has been no pronouncement of the Privy Council saying that S. 4 did not protect clause 36 equally with clause 15 which it was definitely held to protect, it cannot be said that section 98 prior to the amendment necessarily affected clauses 16 and 36. The distinction drawn between the jurisdiction of the High Court under clause 15 and clause 16 was based on the language of section 96, for it has been held that section 96 refers only to appeals from Subordinate Courts and not to appeals from one Judge of the High Court to the High Court. Section 96 does not in terms exclude appeals from one Judge to the other Judges of the High Court; for, it includes all appeals from "any Court exercising original jurisdiction to the Court authorised to hear appeals from decisions of such Court." This language is wide enough to include appeals from one Judge to the other Judges of the High Court. If that is so, then section 96 applies to all appeals and section 98 which clearly relates back to section 96 must also deal with all appeals If section 98 does not affect appeals under clause 15, how can it be held to affect appeals under clause 16? It appears to me that in view of the judgments of the Privy Council in *Bhaidas Shivdas* v *Bai Gulab*[9] and *Sabitri Thakurain* v. *Savi*,[10] section 4 of the Civil Procedure Code of 1908 was enacted in order to save, amongst other enactments, the provisions of the Letters Patent. That this was the view of

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9. (1921) L.R 48 I.A 181 I L.R 45 B 718: 40 M.L.J. 519 (P.C)
10. (1921) L.R. 48 I.A. 76: I.L.R. 48 C 481· 40 M L.J. 308 (P.C.).

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the Legislature is now made clear by the very recent amendment of section 98, Civil Procedure Code.

Another question now arises, namely, whether, if clause 36 be applied in this case, its provisions at the date of the filing of the appeal should be adopted or its provisions as they now stand after amendment. I am inclined to take the latter view, but as the question has been referred to a Full Bench by another Bench of this Court, the decision on the point may be deferred until the opinion of the Full Bench is known.

That being so, it would seem to be advisable to refer the first question at issue for the decision of a Full Bench, as in my view the two decisions of the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab*[9] and *Sabitri Thakurain* v. *Savi*,[10] coupled with the recent amendment of section 98, show that the cases hitherto decided are no longer good law. I would, therefore, refer for the decision of a Full Bench the following question:—

"Is the procedure to be adopted by the High Court in case of an equal division of opinion between the Judges to be governed by clause 36 of the Letters Patent or by section 98 of the Code of Civil Procedure?"

Tiruvenkatachariar, J.

Tiruvenkatachariar, J.—The question whether section 98 of the Civil Procedure Code or clause 36 of the Letters Patent applies when the Judges hearing an appeal preferred to the High Court from a decree of a Subordinate Court differ in their opinion arises in this case and has been argued at considerable length on both sides. For the appellant it is contended that clause 36 of the Letters Patent applies to all appeals which are heard by the High Court whether the appeals are preferred to it under section 96 of the Civil Procedure Code or clause 15 of the Letters Patent.

The contention for the respondents on the other hand is that clause 36 of the Letters Patent applies only to appeals preferred to the High Court under the Letters Patent and that section 98 of the Civil Procedure Code applies to appeals preferred to it under section 96 of the Civil Procedure Code. This point has been discussed in several cases both before and after the decision of the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab*,[9] and the conclusion at which all the High Courts have arrived is that section 98 of the Civil Procedure Code applies to appeals preferred to the High Court from the decree of Subordinate Courts. The question has been considered in these cases from every conceivable point of view that hardly anything useful can be added to the discussion of the point;

9 (1921) L.R 48 I.A. 181· I.L R. 45 B. 718. 40 M L J. 519 (P.C.).
10 (11921) L R 48 I A 76. I L R 48 C 481· 40 M L J 308 (P.C).

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and whatever our own opinion might be, we sitting as a divisional bench would not be justified in dissenting from that view. So far as this case is concerned there is a further point to be considered which has not been considered in the previous cases for the reason that it arises out of a recent amendment of section 98 of the Civil Procedure Code by Act XVIII of 1928 which came into force on 25th September, 1928. By that amendment the following words were added to section 98 of the Civil Procedure Code:—

"Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court"

It should be here mentioned that clause 36 of the Letters Patent was itself amended recently and the amendment came into force so far as this High Court is concerned on the 1st February, 1928. That amendment materially modifies the procedure which was laid down in that clause as to how the appeal should be disposed of in case the Judges hearing the appeal were equally divided. In that case the clause as amended says

"that they shall state the points upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it"

Before this amendment the rule laid down in the clause was that

"in such a case the opinion of the senior Judge shall prevail"

Section 98 of the Civil Procedure Code as it stood before the recent amendment prescribes a different rule for a case where the Judges are equally divided in opinion. In such a case it says that the decree appealed from shall be confirmed; but there is a proviso which says that

"where the Bench hearing an appeal is composed of two Judges belonging to a Court consisting of more than two Judges and the Judges composing the bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it."

It will be seen that the recent amendment of clause 36 of the Letters Patent is modelled on the provisions of the Civil Procedure Code, with this difference, *viz.*, (1) that the reference of the points in difference for the decision of another Judge or Judges is not *discretionary* as in section 98 of the Civil Procedure Code but *obligatory*, (2) the reference to be made under clause 36 is not to be confined to a question of law only as in section 98, Civil Procedure Code, but to extend to questions of

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fact also on which the opinion is divided. The amendment of clause 36 of the Letters Patent thus incorporates and extends the rule enacted in section 98 to all the points (be they questions of fact or questions of law) on which opinion is divided, and the reference to those points is also made obligatory. It seems to me that the subsequent amendment of section 98, Civil Procedure Code, is consequential upon the amendment of clause 36 and if the question is considered in the light afforded by the provisions of the Code and of the Letters Patent as they now stand, it seems to be fairly obvious that the intention of the legislature in amending section 98 as stated above is to make clear that all appeals to the High Court whether they are preferred under the Letters Patent or under the Civil Procedure Code shall, when the opinion of the Judges hearing the appeal is equally divided, be governed by one and the same procedure, *viz.*, that laid down in clause 36 of the Letters Patent. I may however observe that the actual wording of the amendment and its position in the Code leaves room for the contention advanced on behalf of the respondent that all that the amendment of section 98 says is

"that the operation of the Letters Patent with regard to the procedure relating to appeals preferred under the Letters Patent is not intended to be affected by the procedure laid down in section 98, Civil Procedure Code."

In fact in *Bhaidas Shivdas* v. *Bai Gulab*[9] the procedure laid down in section 98 was applied by the High Court to an appeal preferred under the Letters Patent from a decree of a single Judge passed on the Original Side of the High Court and the decree of the trial Judge was affirmed though, if clause 36 of the Letters Patent applied, it should have been reversed. Their Lordships of the Privy Council on appeal held that the procedure prescribed in clause 36 should have been followed and not that prescribed in section 98, Civil Procedure Code.

It was argued for the appellant that the effect of the decision of the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab*[9] and of the recent amendment of section 98 is not only to make clause 36 of the Letters Patent applicable to all appeals heard by the High Court whether they are preferred under the Letters Patent or under the Code, but that in the present case what should be applied is not clause 36 of the Letters Patent as it now stands, but clause 36 as it stood before the amendment. Speaking for myself, I am unable to accept such a contention. The reference to "the provisions of the Letters Patent of any

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9. (1921) L.R. 48 I.A. 181: I.L.R. 45 B. 718: 40 M.L.J. 519 (P.C.).

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High Court", which is made in the recent amendment of section 98, is, in my opinion, to the provisions of the Letters Patent as they stood when the said amendment came into force. Both section 98, Civil Procedure Code, and clause 36 of the Letters Patent are, if I may express my opinion on the point, mere rules of procedure, differing in that respect from clause 15 of the Letters Patent which gives a right of appeal in certain cases from the decision of a single Judge or of a division bench. In that view if clause 36 applies to the present case, I should think that it is the clause as amended which has to be applied and not the clause as it stood before the amendment came into force. This question is already under reference to a Full Bench. I need only add that after the recent amendment of clause 36 there seems to be no reason why the same procedure should not be applied in the case of all appeals heard by the High Court whether the said appeals are preferred to it from the decrees passed in the exercise of its original jurisdiction or from the decrees of Subordinate Courts and that, having regard also to the recent amendment of section 98 of the Civil Procedure Code, the question should, so far as this High Court at least is concerned, be set at rest by a Full Bench.

I therefore concur in the order of reference to a Full Bench proposed by my learned brother.

By Court.—Final orders must now await the result of our reference to Full Bench.

T. M. Krishnaswami Aiyar for *R. Somasundaram* for appellants.

K. S. Krishnaswami Aiyangar for *C. Rama Rao* for respondents.

The Court expressed the following

OPINION.—The question referred to the Full Bench is:

"Is the procedure to be adopted by the High Court in case of an equal division of opinion between the Judges to be governed by clause 36 of the Letters Patent or by section 98 of the Code of Civil Procedure?"

The Letters Patent were issued in 1862 and were modified in 1865 but previously a section like section 98 had been introduced into the Civil Procedure Code of 1859 by the Amending Act of 1861. Between 1865 and 1877, it could not be suggested that the Civil Procedure Code prevailed over the Letters Patent. It was obvious that the Letters Patent prevailed over the Civil Procedure Code. In case of difference of opinion between two Judges, the procedure in the Letters Patent was the only pro-

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cedure to be followed. This was accordingly held in *Nundeeput Mahta* v. *Mr. Alexander Shaw Urquhart*.[1] A fresh Civil Procedure Code was passed in 1877 and another in 1882 and in these Codes section 575 similar to section 98 of the present Code was inserted as in the Code of 1859. As these Codes were after the Letters Patent, the question arose whether section 575 superseded clause 36 of the Letters Patent. That the Indian Legislature could alter or amend the provisions of the Letters Patent was clear from clause 44 of the Letters Patent But for clause 44 the question would never have arisen. One would have thought that an attempt by the Indian Legislature to alter or amend the provisions of the Letters Patent would have been made in express and unambiguous terms and not left to be inferred by implication. No express attempt was made by the Legislature. Still apparently it was contended that impliedly the Indian Legislature did intend to supersede clause 36 of the Letters Patent by section 575 of the Civil Procedure Code. This argument prevailed in *Appaji Bhivrav* v. *Shivlal Khubchand*,[4] a decision of a Full Bench, Westropp, C.J., Melvill and West, JJ. They said:

"We consider that the provisions of the Letters Patent in this respect have been superseded by section 575 of the Act X of 1877—so far as regards cases to which section 575 is applicable"

This was followed in *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami*[3] even in the case of an appeal from the Original Side of the High Court under section 15 of the Letters Patent and in *Hussaini Begam* v. *The Collector of Muzaffarnagar*[5] and other cases. But meanwhile the Privy Council held in *Hurrish Chunder Chowdhry* v. *Kalisundari Debi*[2], that clause 15 of the Letters Patent was not supreseded by section 588 of the Civil Procedure Code. Accordingly in *Chappan* v. *Moidin Kutti*[8] it was held that clause 15 of the Letters Patent was not controlled by any of the provisions of the Civil Procedure Code and this was applied in *Sabapathi Chetti* v. *Narayanasami Chetti*.[17] As a result of the group of cases beginning with *Hurrish Chunder Chowdhry* v. *Kalisundari Debi*[2] it was then held in Allahabad (where there is no Original Side) that clause 36 of the Letters Patent was not superseded by section 575 of the Civil Procedure

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1 (1870) 13 W.R. 209

2 (1882) L.R. 10 I A. 4 I.L.R 9 C 482 (P.C.).

3 (1884) I.L.R. 10 C 814 (F B.). 4 (1879) I L R 3 B 204 (F.B).

5 (1889) I L.R. 11 A 176

8 (1898) I L R 22 M 68; 8 M L J 231 (F B)

17 (1901) I.L.R. 25 M. 555. 11 M.L.J. 346.

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Code. This was followed in *Roop Laul* v. *Lakshmi Doss*[19] though the latter case is from the Original Side. It will be noticed that the reasoning in *Lachman Singh* v. *Ram Lagan Singh*[20] is perfectly general and if clause 36 of the Letters Patent was not to be considered as superseded by section 575 of the Civil Procedure Code, it must be so as regards all appeals whether the appeals themselves are under the Civil Procedure Code or under clause 15 of the Letters Patent. In spite of this obvious consideration and the decision in *Lachman Singh* v. *Ram Lagan Singh*[20] a practice arose in this Court according to which it was supposed that the only effect of the decision in *Roop Laul* v. *Lakshmi Doss*[19] was to make clause 36 of the Letters Patent applicable to appeals under clause 15 of the Letters Patent but not to appeals under the Civil Procedure Code as to which, in case of difference of opinion, section 575 of the Civil Procedure Code would continue to apply as before, *Hurrish Chunder Chowdhry* v. *Kalisundari Debi*.[2] But this practice is not represented by any reported decision in this Court. In *Surajmal* v. *Horniman*[21] it was held that clause 36 of the Letters Patent applied in an appeal from the Original Side but the reasoning on which the judgment was based was perfectly general and will equally apply to appeals under the Civil Procedure Code. In *Veeraraghava Reddi* v. *Subba Reddi*[7] it was held that even in the case of appeals from mufassal Courts, clause 36 of the Letters Patent applied, but the question was not discussed. But in *Bhuta* v. *Lakadu Dhansing*[6] the opposite conclusion was arrived at by a Full Bench. Then we have got the decision in *Bhaidas Shivdas* v. *Bai Gulab*,[9] a decision of the Privy Council. That was a case on the Original Side of the Bombay High Court. There was an appeal. The learned Judges differed and section 98 of the Civil Procedure Code was applied. Under section 98, sub-section (2), the question was referred to another Bench and was decided adversely to the plaintiff. This must have been before the Full Bench decision in *Bhuta* v. *Lakadu Dhansing*.[6] The plaintiff then carried an appeal to the Privy Council on the ground that section 98 was wrongly applied. The Privy Council held that clause 36 of the Letters Patent ought to be applied.

2 (1882) L.R. 10 I.A 4: I.L.R. 9 C 482 (P.C.).
6. (1918) I.L.R 43 B 433 (F.B.)
7. (1919) I.L.R. 43 M 37: 37 M.L.J 449.
9 (1921) L.R. 48 I.A. 181: I.L.R 45 B. 718: 40 M L.J. 519 (P.C.).
19. (1905) I.L.R. 29 M 1 20 (1903) I.L.R. 26 A. 10.
21. (1917) 20 Bom. L R 185.

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Lord Buckmaster who delivered the judgment of the Judicial Committee rested his conclusion by reference to section 4 of the Civil Procedure Code. His reasoning is similar to that in *Surajmal* v. *Horniman*[21] and was perfectly general, so that even in the case of appeals under the Civil Procedure Code, clause 36 should apply. Lord Buckmaster expressly approves of the decision in *Lachman Singh* v. *Ram Lagan Singh*[20] which was a case of an appeal under the Code. The point was accordingly raised in this Court in *Venkatasubbiah* v. *Venkatasubbarama*[11]. The case in *Bhaidas Shivdas* v. *Bai Gulab*[9] was cited before the learned Judges but the fact that *Lachman Singh* v. *Ram Lagan Singh*[20] was approved by the Privy Council seems to have been overlooked. Venkatasubba Rao, J., relied on the previous practice in this Court in applying S. 98 of the Civil Procedure Code to appeals under that Code and he held that *Bhaidas Shivdas* v. *Bai Gulab*[9] was not intended to overrule the prior rule of law as represented by the practice of this Court. This is the first decision of this Court, apart from practice, decided after a consideration of the point that section 98 and not clause 36 of the Letters Patent applied to appeals under the Civil Procedure Code. In *Purna Chandra Chatterji* v. *Narendra Nath Chowdhry*[22] Walmsley, J., held that clause 36 ought to apply and a similar conclusion was arrived at by a Bench of three Judges in *Suresh Chandra Mukherjee* v. *Shiti Kanta Banerjee.*[14] But in a later case in *Prafulla Kamini Roy* v. *Bhabani Nath Roy,*[15] Page, J., who was a party to *Suresh Chandra Mukherjee* v. *Shiti Kanta Banerjee*[14] changed his opinion and held that the decision of the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab*[9] must be limited to appeals under clause 15 of the Letters Patent and does not apply to appeals under the Civil Procedure Code. Walmsley, J., who was a party to *Purna Chandra Chatterji* v. *Narendra Nath Chowdhry*[22] deferred to the opinion of Page, J., and was willing to change his opinion. Page, J., invited the legislature to solve the doubts and difficulties by an express enactment In *Punjab Akhbarat and Press Co.* v. *Ogilvie*[13] it was held that section 98 should apply though the Chief Justice appeared to be inclined to the opposite view if the matter were *res integra.*

9 (1921) L.R 48 I.A 181 I.L R 45 B. 718 40 M.L.J. 519 (P.C.)
11. (1924) 21 L W 721
13 (1925) I L.R. 7 Lah. 179. 14 (1924) I.L R 51 C 669 (F B).
15 (1925) I.L.R. 52 C 1018
20. (1903) I.L R. 26 A. 10 21. (1917) 20 Bom. L R. 185
22 (1925) 29 C.W.N. 755 (F.B.),

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At this stage of the Case Law, Act XVIII of 1928 was passed amending section 98 of the Code of Civil Procedure. An explanation was added to section 98 to this effect:—

"Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

This explanation is perfectly clear and is intended to provide that clause 36 of the Letters Patent should not be governed by section 98 of the Civil Procedure Code. I have referred to the earlier history of the Case Law not for the purpose of construing this amending Act in the light of such history—a practice condemned by the House of Lords in *Bank of England v. Vagliano Brothers*[23] but for a different purpose to be referred to presently. Mr. Krishnaswami Aiyangar, the learned Advocate for the respondents, contended that the Amending Act does not lead to the conclusion that in appeals under the Civil Procedure Code, clause 36 of the Letters Patent applies. His argument may be thus stated: the Amending Act is declaratory in its nature; it is not intended to alter the law; the law as previously understood was that section 98 applies to appeals under the Civil Procedure Code and clause 36 of the Letters Patent applies to appeals under the Letters Patent and this was not intended to be altered by the Amending Act; the effect of the Amending Act is only to confirm the previous state of the law. There is a fallacy in the whole of this argument. It is true that the Amending Act is intended to be declaratory, that is, not only is its object to make the law clear from its date but also to make the Act retrospective; that is, there is no change in the law. The law both before the amendment and after the amendment is the same. To this extent I agree with the argument of the learned Advocate that the amendment is declaratory. But to assume from this that the Amending Act did not intend to alter the law as expounded by the decisions up to that date does not follow. In the first place, it is not correct to say that there is a well-understood rule of law prior to the amendment in the manner stated by the learned Advocate for the respondents. The decision in *Lachman Singh v. Ram Lagan Singh*[20] and *Veeraraghava Reddi v Subba Reddi*[7] indicate the contrary. In my opinion, the object of the amendment is to make it now

7 (1919) I L R. 43 M 37 37 M.L.J. 449.
20 (1903) I.L.R. 26 A. 10
23. (1891) A.C. 107.

perfectly clear that for any purpose clause 36 of the Letters Patent should never be controlled by the Civil Procedure Code. This was the view of Lord Buckmaster in *Bhaidas Shivdas* v. *Bai Gulab*[9] and the cases approved therein. The Amending Act is really the response of the legislature to the invitation of Page, J.

The learend Advocate for the respondents addressed another argument which also proceeded on the footing that there is a well-understood practice or rule of law prior to the Act. I have already shown that there is no such well-understood practice or rule of law; but apart from this, this argument is otherwise equally fallacious. He relied on section 4 of the Amending Act which saves prior existing rights, etc. Clause 3 of the section saves any principle or rule of law previously established "notwithstanding that the same may have been derived by, in or from any enactment hereby repealed." This shows that section 4 applied only to the repealing part of the enactment and has nothing to do with the amending part of the enactment. If any rule of law under an enactment amended by the Act of 1928 was intended to be saved, the language used would have been "from any enactment hereby amended or repealed." Therefore this argument of the learned Advocate also fails.

The result is that it is now beyond all doubt that clause 36 of the Letters Patent applies to all appeals. It may be asked, when does section 98 of the Civil Procedure Code have any operation and why should the legislature not say that the section does not apply to Chartered High Courts instead of adding an explanation to the section? The reply is that section 98 applies now only to Courts other than the Chartered High Courts, that is, the Chief Courts and Courts of Judicial Commissioners and the reason why the legislature adopted this particular form of elucidating the matter is that it was intended to retain section 98 as applicable even to Chartered High Courts but to make the application subject to clause 36 of the Letters Patent. If, at any time, clause 36 of the Letters Patent ceases to exist, section 98 will come into operation. It is to attain this particular result that the explanation was added to section 98 instead of saying that section 98 does not apply to Chartered High Courts at all. I would answer the question referred to us thus:

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9. (1921) L.R. 48 I.A. 181: I.L.R. 45 B. 718: 40 M.L.J. 519 (P.C.).

"The procedure adopted by the High Court should be governed by clause (36) of the Letters Patent "

Kumaraswami Sastri, J.—I agree.

Reilly, J.—I agree.

N.S. *Reference answered.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD SHAW, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Faizullah Khan and another .. *Appellants** (*Plffs.*)

v.

Mauladad Khan and others .. *Respondents* (*Defts.*).

Court Fees Act (VII of 1870), S 7 (iv) (f)—Partnership—Accounts—Plaintiffs' claim for Rs. 3,000—Defence disputing, and counter-claiming Rs 29,000—Decree dismissing plaintiffs' claim and decreeing defence claim to extent of Rs 19,991—Plaintiffs' appeal as regards both parts of decree—Valuation of, for purposes of Court-fee—Court-fee payable on appeal memo—Insufficiency of Court-fee paid—Procedure in case of—Discretion under section 149, C P. Code—Postponement of decision of proper Court-fee till ascertainment of final value—Appeal—Presentation of—Date of—Presentation in time with insufficient Court-fee—Payment of deficient Court-fee after expiry of appeal time—Appeal not barred.

The case between the parties had reference to the rendering of accounts and the settlement of the sums due thereon in connection with a dissolved partnership The plaintiffs valued their suit at Rs 3,000 for the purpose of Court-fees and asked for a rendering of accounts and a decree for Rs. 3,000 with a statement "if more than Rs 3,000 be found due to the plaintiffs they will pay an additional Court-fee". In his pleas the 1st defendant asked for a decree in his own favour for Rs 29,000, and he challenged the shares as given by the plaintiffs, and asked for dismissal of their suit The final decree passed in the suit declared Rs. 19,991 to be due to the 1st defendant by the plaintiffs. No sum was found due to the plaintiffs under their claim for Rs. 3,000 Both parties appealed from the judgment The plaintiffs by their appeal challenged the decree against them for over Rs 19,000 and maintained that that sum in whole or in part should be disallowed, and that their own claim of Rs 3,000 or less or more should be granted in their favour. They valued their appeal, for purposes of Court-fee, at Rs 19,991, and paid the Court-fee of Rs 975 due thereon. The Appellate Court held that only a sectional and not a fee covering all the relief sought had been paid, and that therefore the claim for Rs. 3,000 had finally dropped out of the case It accordingly held that a remand should only be granted as to the Rs. 19,000.

Held, reversing the Court below, that the memorandum of appeal by the plaintiffs to the Court below did state in terms of the Court Fees Act

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the amount at which the relief was sought, and that the Court-fee paid thereon was sufficient to cover also the relief as regards the Rs. 3,000.

There is no reason for treating the payment of Rs. 975 either as upon an under value or a split value. It was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the plaintiffs. That amount may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other.

Held further that, assuming that a mistake had been made in regard the payment of the proper Court-fee, the case was pre-eminently one f the exercise of the discretion (under S. 149 of Civil Procedure Code) for giving an opportunity to make up the deficiency, or for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained [S. 7 (*iv*) (*f*) of the Court Fees Act].

Where, in the case of a memorandum of appeal duly presented to and accepted by the Court, the valuation of the appeal, for purposes of Court-fee, is found to be unsatisfactory or in the end insufficient, that is validated by the additional payment necessary to make up the deficiency, the result of which payment is that the memorandum of appeal stands good from its date.

Consolidated Appeals Nos. 19 and 20 of 1928 against an order, dated the 7th May, 1925, of the Court of the Judicial Commissioner of the North-West Frontier Province, Peshawar (Colonel J. Frizelle), setting aside a decree, dated the 24th March, 1924, of the Court of the Honorary Subordinate Judge, First Class, Dera Ismail Khan.

The material facts of the case appear sufficiently from their Lordships' judgment.

De Gruyther, K.C. and *Parikh* for appellants.

Schiller, K.C. and *Wallach* for respondents.

De Gruyther, K.C.—Section 149, Civil Procedure Code, 1908, applies to the case. The appellants are willing to make up the deficiency, if any, in Court-fee.

[*Sir Lancelot Sanderson.*—The application for payment of the extra Court-fee should be made at the date of the hearing of the appeal.]

[*Lord Shaw.*—The Crown can never be deprived of the proper Court-fee. It can always demand the right sum: *see* section 11, Court Fees Act.]

Presentation of the appeal to the proper officer of the Court stops limitation running: Order 41, Rule 9, Civil Procedure Code.

[*Lord Tomlin*.—Under section 11 of the Court Fees Act the plaintiffs would have to pay the full Court-fee on all the reliefs they get.]

Parikh follows.

Schiller, K.C. for respondents.—The Judicial Commissioner was right in holding that the appellants were entitled to remand only as to the amounts of their claim on appeal on which they had paid Court-fees.

[*Lord Shaw*.—In any event, the Government is not going to suffer.]

[*Lord Tomlin* refers to section 6 of the Court Fees Act. In section 7, the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course, if the appellant recovers more, he pays the extra fee under section 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount.]

15th March, 1929. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is a consolidated appeal from an order dated the 7th May, 1925, in the Court of the Judicial Commissioner of the North-West Frontier Province, Peshawar, which set aside a decree of the Honorary Subordinate Judge of Dera Ismail Khan, dated the 24th March, 1924.

Stated generally, the case between the parties had reference to the rendering of accounts and the settlement of the sums due thereon in connection with a partnership of a firm of contractors for supply and transport and military works. The partnership is now dissolved.

In the suit, brought on the 29th March, 1923, Faizullah Khan and Sherdad Khan, plaintiffs and appellants, valued their suit at Rs. 3,000 for the purpose of Court-fees, and asked for a rendering of accounts and a decree for Rs. 3,000 with the statement "if more than Rs. 3,000 be found due to the plaintiffs they will pay an additional Court-fee." In his pleas Mauladad Khan, the first defendant, asked for a decree in his

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own favour for Rs. 29,000, and he challenged the shares as given by the plaintiffs and asked for dismissal of their suit. As stated in the appellants' case:—

6 The suit was tried by the Honorary Subordinate Judge, First Class, Dera Ismail Khan, who on the 22nd October, 1923, passed a preliminary decree determining the respective shares of the parties in the partnership, and ordering accounts to be taken according to the directions given by him. There was no appeal against this decree, which has therefore become binding on the parties.

On the 24th March, 1924, the Honorary Subordinate Judge passed a final decree with costs and interest. Under that decree Rs. 19,991 were declared to be due to Mauladad Khan, the first defendant, by plaintiffs-appellants. No sum was found due to the appellants under their claim for Rs. 3,000.

This judgment was appealed from by both parties. The position of the plaintiffs still remained the same, namely, that they challenged the decree against them for over Rs. 19,000 and maintained that that sum in whole or in part should be disallowed, and that their own claim of Rs. 3,000 or less or more should be granted in their favour. It is plain that any substantial inversion of liability under the respective decrees would result in all likelihood in the sums awarded on appeal to both parties being much within Rs. 19,000 awarded to one. In these circumstances the appeal was taken, and the claim in the appeal to the Court of the Judicial Commissioner was expressly as follows:—

"Claim in Appeal.—For reversal of the decree against the appellants and for granting a decree in their favour for such amount as may be found due. Value for purposes of Court-fee of Appeal, Rs. 19,991"

This appeal was duly received and the copy of the office endorsement upon it states: "Presented by Lala Sham Das, agent of appellants. Is within time. The Court-fee is correct and necessary copies are attached."

It is only necessary to observe that this applied to a valuation of the appeal in its entirety, that is to say, both for the purpose of reversing the decree against the appellants and for granting the decree in their favour.

The Court-fee due upon the appeal valued as an entirety as thus stated was Rs. 975, and that was duly paid.

Their Lordships find no reason for treating that payment either as upon an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner,

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that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach, and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other.

Their Lordships are clearly of opinion that the memorandum of appeal in the present case did state in terms of the Act the amount at which the relief was sought. This determines the appeal. A reference may be added to the results which would have followed from the course adopted below.

The Judicial Commissioner found that a remand should only be granted as to the Rs. 19,000. The result of this would be that although accounts were taken on the remand and the Rs 19,000 was largely reduced and the sum of Rs. 3,000 or more or less than that sum were found due to the plaintiffs, no remedy could be granted for the latter event, because according to the judgment only a sectional and not a fee covering all the relief sought had been paid, and therefore one item and claim for Rs. 3,000 had finally dropped out of the case. The learned counsel for the respondents frankly argued the case on this footing, declaring that the appeal in so far as it could be held to refer to the Rs. 3,000 had gone, and must be dismissed as a nullity. For the reasons stated, their Lordships cannot accept this argument; the extraordinary consequences figured accordingly do not arise. But upon a second point—an important point of procedure—their Lordships think it right to add the following: Granted that a fee had been paid which was insufficient in amount what was the duty of the Court?

In such a case as the present it appears to be pre-eminently one for the exercise by the judicial authority of the discretion for giving an opportunity to add to the amount lodged the extra Rs. 70 or Rs 80 required or for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained The provisions of the Court Fees Act which are in place (Act VII of 1870), section 7 (*iv*) (*f*), for "accounts," . . "according to the amount at which the relief is sought, is valued in the plaint or memorandum of appeal." Even, accordingly if the mistake insisted on had been made, this, in the opinion of the Board, was a plain case for rectifying that

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situation if it could be done, and the Courts are fortunately furnished with an easy method of doing so.

Section 149 of the Code of Civil Procedure, 1908, provides:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document in respect o which such fee is payable, shall have the same force and effect as if su fee had been paid in the first instance."

It will be observed that that discretion extends to the whc or any part of any fee prescribed, and can be exercised at any stage in the case, while finally, upon the extra payment being made, then the document is to have the same effect as if it had been paid in the first instance.

This also answers the argument presented under the Limitation Act. The dates are as follows:—The decree of the Subordinate Judge was dated the 24th March, 1924, the first appeal was on the 27th May and the second on the 2nd June, bringing before the Appeal Court the respective claims of each suitor. The time for limitation of the appeal is 90 days, and it is thus seen that both appeals were within time. They were not a nullity. On the contrary, they were documents duly presented to and accepted by the Court, and as to the fee thereon, should the valuation be unsatisfactory or in the end insufficient, that is validated by the additional payment, the result of which payment is that the document, namely, the memorandum of appeal, stands good from its date. The appeals are accordingly not time barred.

Their Lordships will humbly advise His Majesty to allow this appeal, to set aside the order of the Judicial Commissioner dated the 7th May, 1925, and to remit the case to the Court of the Subordinate Judge for a fresh trial and decision on the merits. The appellants will have the costs incurred in the Court of the Judicial Commissioner and of this appeal. The costs incurred in the Court of the Subordinate Judge will abide the result of the new trial.

Solicitors for appellants: *Stanley Johnson & Allen.*

Solicitors for first respondent: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD CARSON, SIR LANCELOT SANDERSON AND SIR BINOD MITTER.

Radhoba Baloba Vagh and others .. *Appellants** *(Plffs.)*

v.

Aburao Bhagwantrao Shirole and others .. *Respondents* *(Defts.)*.

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Limitation Act (IX of 1908), Art 127—Exclusion from joint family property—What amounts to—Evidence—Partition—Suit for—Demand for partition prior to, and what happened then and pursuant to such demand—Evidence of—Sale-deed about a year after alleged demand by member—Recital in, as to demand—Admissibility in evidence of deed and of recital in it—Purpose of—Evidence Act, S. 157—Admissibility under

The question whether a person has been excluded from joint family property within the meaning of Art. 127 of the Limitation Act must depend upon the facts of the particular case which is under consideration. An intention to exclude is an essential element, and it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude a member. The questions arising upon Art. 127 are: (1) whether the member in question was excluded from the joint family property; (2) if he was so excluded, when did such exclusion take place; and (3) when did the exclusion, if any, become known to him.

R, who with his brothers *B* and *G* constituted a joint Hindu family, had a son, *N,* by his second wife. Within a year of his marriage with *N's* mother, and while she was living in the family dwelling-house, *R* married another lady, being the third wife. *N* was born in June, 1886. Up to 1886 *N's* mother lived with her husband in his family dwelling-house. Owing to friction in *R's* family, due to his third wife, *N's* mother and her two children were, soon after the birth of *N,* taken by his maternal uncle with *R's* consent to live with him (the maternal uncle) at his own village. In September, 1888, *N's* mother and her two children were, however, brought back by *R,* or by one of his brothers acting on his behalf, to *R's* family dwelling-house, and they lived there until *R's* death in 1893. They continued to live there until 1898, when *N's* mother and his elder brother died of the plague. *N's* maternal uncle went to *R's* village for the obsequies of *N's* mother, and, with the consent of *B, N's* paternal uncle, he took *N* to his own home in another village. *N* was at that time 12 years old. Thereafter *N* lived with and was maintained by his maternal uncle, and assisted his uncle in his agriculture After that date *N* never resided in the family dwelling-house and he received no maintenance or education from the members of the joint family. *N* was married in or about 1908. The marriage took place in his maternal uncle's village at the same time as the marriage of his uncle's brother. Accordingly his marriage expenses were practically *nil* No application was made by him or on his behalf to the members of his joint family for any assistance towards his marriage expenses, and they did not provide anything towards the same. About two years after his marriage *N* began to live separately, and he then got some land, which he rented from the Government, at his maternal uncle's village.

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*P.C. Appeal No. 98 of 1927. 14th June, 1929.

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In a suit for partition instituted by *N* on 21st July, 1920, the High Court dismissed the suit, holding that *N* had been excluded from the joint family property from 1898, and that he must be taken to have been perfectly well aware of the fact in 1904, when he came of age. The ground of their decision was that the whole series of facts, beginning with 1898, when his mother died, showed that *N's* connection with the family had been severed and that he acquiesced in that severance.

Held, reversing the High Court, that the evidence was not sufficient to justify the finding that *N* was excluded from the joint family property in 1898, and that, even if the facts relied upon could be said to amoun to exclusion, the defendants had failed to prove that *N* was aware mo than 12 years before the institution of the suit of any intention on t part of the members of the joint family to exclude him from the jo family property when he should choose to assert his rights.

In a suit for partition instituted by *N* in 1920, his case and evidence were to the effect that in 1909 he (then living with his maternal uncle in his maternal uncle's village) went to his father's village, saw *B*, his paternal uncle and the *karta* of the joint family, and demanded a partition and the allotment to him of his share of the joint family property, that *B* advised him to continue joint and not to demand a separate share, that *B* promised to arrange an advance of money for *N*, and took him to *S*, and that he obtained a sum of Rs 1,500 from *S*. In June, 1910, *N* executed a sale-deed conveying his share in the joint family property to *S* for the sum of Rs. 1,500. The sale-deed recited, *inter alia*, "About a year ago I came to Poona and asked my uncles and my step-brothers to effect a partition and to allot to me my one-ninth share of our ancestral property. But they refused to give (my) share."

On a question being raised as to whether the recitals in the said sale-deed were or were not admissible against the defendants (the other members of the family) on the issue whether *N* demanded a share of the property in 1909, *held*, that the sale-deed was some evidence of the act alleged to have been done in pursuance of *N's* interview with *B*, and that it was material on the question whether the evidence of *N* and his witnesses on that part of the case could be relied upon.

It may be that this particular statement (the recital in the deed set out above) does not come within S. 157 of the Evidence Act on the ground that it was not made at or about the time of *N's* alleged interview with *B* in 1909.

Held further that apart from the particular recital in the deed as to the interview with *N's* uncles about a year ago, the deed itself was material corroboration of the plaintiffs' case and was admissible in evidence.

Appeal No. 98 of 1927 from a judgment and decree of the High Court, Bombay (Macleod, C.J. and Coyajee, J.), dated the 17th February, 1925, reversing a judgment and decree, dated the 22nd January, 1923, of the Court of the First Class Subordinate Judge of Poona, and dismissing a suit which he had decreed.

The appellants brought that suit on the 21st July, 1920, against the respondents for a ninth share of property which was in their possession as joint family property.

The appellants claimed part of that share through the 3rd appellant Nana: the respondents denied that Nana was a member of their family, but they withdrew this denial at the

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hearing of the appeal in the High Court and confined their defence to a contention not specifically raised in the issues, *i.e.*, that they had excluded Nana from the joint family property, and his exclusion had been known to him for more than 12 years before suit. The Subordinate Judge decided against, and the High Court in favour of, this contention.

Dunne, K. C. and *Raikes* for appellants.

De Gruyther, K. C. and *Parikh* for respondents.

14th June, 1929. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiffs against a decree of the High Court of Judicature of Bombay, dated the 17th of February, 1925, which reversed a decree of the Subordinate Judge of Poona, dated the 22nd of January, 1923.

The plaintiffs brought the suit for a declaration that the immovable and movable properties mentioned in the plaint were the ancestral properties of the joint family of the third plaintiff, Nana Ramrao, and the defendants, and that the plaintiff Nana had a one-ninth share in the said properties, for partition and other consequential reliefs.

It appears that by a deed, dated the 6th of June, 1910, Nana sold his one-ninth share in certain of the properties mentioned in the plaint for Rs. 1,500 to the father of the first and second plaintiffs.

The father of these plaintiffs died, and it was alleged that after his death, namely, on or about the 13th of August, 1919, Nana obtained a further sum of Rs. 500 from the first and second plaintiffs, and that the first and second plaintiffs had thus become the owners of Nana's one-ninth share of the property described in Schedule B of the plaint.

Consequently the first and second plaintiffs were joined with Nana as parties in the suit for partition.

The pedigree relied upon by the plaintiffs was as follows.—

RAJARAM (d. 1900).

(2) Chimabai = Ramrao (d. 1893) = (3) Rakhmabai — Bhagwantrao (d. 1917) — Ganpatrao (d 1919)
Chimabai d. 1898; Ramrao =(1) Abai

Ramrao & Chimabai: Yadava (d. 1898), Nana (Pltf. 3)
Ramrao & Abai: Bajirao (Deft. 4)
Ramrao & Rakhmabai: Madhavrao (Deft. 5), Ambu (d. 1901)
Bhagwantrao: Aburao (Deft. 1)
Ganpatrao: Baburao (Deft. 2), Gulabrao (Deft. 3)

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The defence of the first five defendants was twofold: they alleged—(1) that Nana was not the son of Ramrao, that Chimabai, the mother of Nana, was of a wicked nature, and was driven out of the house by Ramrao; that Nana was never joint with the defendants, and that he was not a member of the joint family. (2) That the suit was barred by the law of limitation.

It was alleged that, after attaining majority, Nana mad an attempt to get a share in the property, that he was told clear terms that he had no interest therein, and that his rig was denied by the defendants, by his deceased paternal uncles, and others.

No date for the alleged attempt by the plaintiff and the alleged denial of his interest was specified in the written statement of the first five defendants, but in the course of the evidence given on behalf of these defendants it was alleged that the date was 1905—1906 or 1906—1907.

The suit was instituted on the 24th of July, 1920, and these defendants, relying upon Article 127 of Schedule I of the Indian Limitation Act IX of 1908, alleged that the suit was barred by limitation.

The defendants 6, 7 and 8 were added as parties to the suit by reason of their having an interest in some of the property, but they did not dispute the plaintiffs' case.

The learned Subordinate Judge held that Nana was the son of Ramrao by his wife Chimabai and that there was no exclusion made to the knowledge of Nana. Consequently he made a preliminary decree in favour of the plaintiffs to the effect that the plaintiff Nana had a one-ninth share in the immovable and movable property therein mentioned, and he directed that the lands should be partitioned by the Collector. The learned Judge, after dealing with certain incidental matters, directed that the defendants Nos. 1 to 5 should pay the plaintiffs' costs as well as those of the other defendants.

The first and fifth defendants, viz., Aburao Bhagwantrao Shirole and Madhavrao Ramrao Shirole, appealed to the High Court against the decree of the learned Subordinate Judge, making the other parties to the suit respondents.

On the hearing of the appeal the finding of the learned Subordinate Judge as to the legitimacy of Nana was not disputed, and the only question argued before the High Court was whether Nana, the third plaintiff, had been excluded from the

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joint family property to his knowledge for more than twelve years before the date of the suit, viz., the 21st of July, 1920.

The learned Judges of the High Court allowed the appeal and dismissed the suit, but directed that there should be no order as to costs throughout. The ground of their decision was that the whole series of facts, beginning with 1898, when his mother died, showed that Nana's connection with the family had been severed and that he acquiesced in that severance.

Their conclusion was that Nana was excluded from the joint family property from 1898, and that he must be taken to have been perfectly well aware of the fact in 1904, when he came of age.

From the judgment and decree of the High Court the plaintiffs have appealed.

The material facts of the case are as follows:—After the death of his first wife Abai, Ramrao married Chimabai, who became the mother of two sons, Yadava and Nana.

Within a year of this second marriage and while Chimabai was living in the family dwelling-house, Ramrao married a third time, Rakhmabai being the third wife.

It was found by the learned Subordinate Judge that Ramrao had a second son by Chimabai, namely, Nana, the third plaintiff, who was born in June, 1886. As already stated, this finding is not now disputed; but it is not immaterial to note that the case of the first five defendants was that Chimabai's second son was named Keshav, who was alleged to be dead.

The learned Subordinate Judge held that Keshav was "a fabulous person."

The family dwelling-house of Ramrao and his joint family was at Bhamburda, and there is no doubt that up to 1886 Chimabai was living with her husband in the aforesaid family house.

Apparently there was much friction in Ramrao's family, due, it is alleged, to the presence of Rakhmabai, and in the year 1886, soon after the birth of Nana, Chimabai and her two children were taken by her maternal uncle, Appa, with the consent of her husband Ramrao, to live with him at a place called Patas.

Chimabai and her two sons lived with her maternal uncle until 1888.

On the 8th September, 1888, Chimabai sent what was called a "notice" in writing to her husband Ramrao, demand-

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ing maintenance for herself and her two children. The "notice" was as follows:—

"The date the 8th of September, 1888 A.D.

"NOTICE.

"To

"Ramrao Bin Rajaram Shirole residing at Bhamburde, Taluka Haveli, District Poona.

"Notice is given by the undersigned as follows:—

"You are my husband and you married a second wife afterwards, and consequently you could not make proper arrangement for my livin, (with you), and you were always troubling and beating me Thereafter during the period of my delivery no proper arrangements were made, and consequently I became very ill. At that time my maternal uncle had come to Poona, to whom you told that he should take me with him, as I was very ill Therefore my maternal uncle took me to his place, i.e., at Patas Even though 2¼ years have elapsed since then, you have never again inquired of me. Besides, I have two small children. You have not even cared for them, nor are you taking us to your place. You should, therefore, make arrangements for the maintenance of myself and my children from this day. This is in order. If you fail to do so, I shall take legal steps against you. You should send a reply to this Notice within fifteen days from to-day."

The result of the "notice" was that Chimabai and her two children were brought back by Ramrao, or by one of his brothers acting on his behalf, to the family dwelling of Ramrao at Bhamburda, and Chimabai and her two sons lived there until Ramrao's death in 1893.

Chimabai and her two sons after 1893 continued to live in the family dwelling-house until 1898, when Chimabai and her elder son died of the plague.

Chimabai died on the 23rd February, 1898, and Yadava, elder son, died on the following day.

Nana's maternal uncle, Appa, went to Bhamburda for Chimabai's obsequies, and, with the consent of Bhagwantrao, the paternal uncle of Nana, he took Nana to his own home in the village of Sonavadi.

At that time Nana was twelve years old.

It is material to note that this is the date at which, according to the judgment of the High Court, Nana's connection with the family was severed, and his exclusion from the joint family property began.

Nana lived with and was maintained by his maternal uncle, Appa, at Sonavadi, and assisted his uncle in his agriculture.

Nana was illiterate. This is one of the facts relied upon by the first five defendants as showing that he was excluded from the joint family and the joint family property. It was,

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however, pointed out by the learned Subordinate Judge that when Nana's father died he was about seven years old and had not attained the school-going age.

After his father's death, as the learned Subordinate Judge held, Rakhmabai ruled the family, and it was not the fault of Nana that he was not put to school.

In 1898 Nana was removed to the house of his maternal uncle at Sonavadi, where there was no vernacular school, though there appeared to have been a school at Dhond, to which Sonavadi boys used to go.

It was alleged by the first five defendants, as already stated, that in 1905 or 1906 Nana went to Bhamburda and demanded a share of the family property, and that he then received a definite refusal from some of the members of the joint family These defendants relied on this alleged incident as evidence of an exclusion from the joint family property at that time.

The learned Subordinate Judge said that he did not believe the witnesses called to prove the above-mentioned alleged demand and refusal in 1905 or 1906, and he held that Nana's demand for a share was not made until 1909, when it was refused, and that, consequently, the suit was in time.

The learned Judges of the High Court came to no definite decision as to the alleged incident of 1905—1906, but based their decision upon the general evidence in the case.

Their Lordships' attention was drawn to the evidence, upon which the first five defendants relied, to support the allegation that it was in 1905 or 1906 that Nana demanded a share of the joint family property and was refused. They are clearly of opinion that the learned Subordinate Judge's decision in this respect was right, and that there was no satisfactory evidence upon which it could be held that in 1905 or 1906 Nana made a demand for a share of the property and was refused by the members of the joint family.

Nana was married in or about 1908 His marriage took place at Sonavadi at the same time as the marriage of Appa's brother, and Appa's evidence was that Nana's marriage caused no additional cost.

It is clear that no application was made by or on behalf of Nana to the members of his joint family for any assistance towards his marriage expenses.

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About two years after his marriage Nana began to live separately, and he then got some land, which he rented from the Government, at Sonavadi.

The plaintiffs' case was that in 1909 Nana went to Bhamburda and saw Bhagwantrao, who was the eldest surviving brother of Ramrao, and presumably at that time the *karta* of the family, as Ramrao died in 1893 and Rajaram died in 1900.

Nana's evidence was to the effect that at this interview Bhagwantrao advised him to continue joint and not to demand a separate share; but that he, Nana, insisted on a partition.

Then, it was alleged, Bhagwantrao promised to arrange an advance of money for Nana, and that he took Nana to Baloba Narayan Vagh, the father of the first two plaintiffs, and that he obtained the sum of Rs. 1,500 from Baloba Narayan Vagh.

Nana alleged that Bhagwantrao, although still persisting in his refusal to partition the property did not deny Nana's [illegible] in it.

There is no doubt that Nana did obtain Rs. 1,500 from Baloba Narayan Vagh, the father of the first two plaintiffs, though, according to the deed of sale, to which reference has already been made, the said sum was not obtained until June, 1910.

On the 6th June, 1910, Nana executed the deed of sale in favour of Baloba Narayan Vagh, the father of the first two plaintiffs. It was recited therein that the properties included in the deed were ancestral and belonged to the joint family of Nana's father and uncles, that Nana had a one-ninth share therein, and the amount of the consideration was Rs. 1,500.

The deed contained the following recital:—

> "I was six or seven years old when my father died After my father's death my mother Chimabai and I used to live with my uncle for some days. But owing to step-motherly relations there were quarrels and disputes between my mother and other members of the family. Thereafter my mother died. Therefore I used to live with my maternal uncle, Appa Bahirji Patil Pawar, who resides at Sonavadi, Taluka Bhimthadi About a year ago I came to Poona and asked my uncles and my step-brothers to effect a partition and to allot to me my one-ninth share of our ancestral property But they refused to give (my) share I am not a permanent resident in Poona, and as I follow the occupation of a cartman at Mouje Sonavdi Peta Dhond, I cannot live at Poona and I cannot afford to fight a suit (in a court of law). Therefore I have received from you Rs 1,500—in words, rupees fifteen hundred—as price of my one-ninth share of the aforesaid property and have sold to you my right of ownership, title and interest with respect to the one-ninth share of the said property."

It was argued on behalf of the defendant-respondents that the recitals in the above-mentioned deed were not admissible as

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vidence against them on the issue whether Nana demanded a hare of the property in 1909.

It was submitted that it did not come within section 157 f the Indian Evidence Act (I of 1872) upon which the earned counsel for the plaintiffs relied.

It was urged that the statement therein contained as to the act of his having gone to Poona and having asked his uncles nd step-brothers to effect a partition about a year before the d was executed could not be said to be a former statement de by Nana at or about the time when the fact took place, nasmuch as the statement in the deed was made a year after the act was alleged to have happened.

It may be that this particular statement does not come vithin section 157 on the ground that it was not made at or bout the time of Nana's alleged interview with Bhagwantrao n 1909, but, in their Lordships' opinion, the deed is admissible n evidence as corroboration of the evidence given by Nana and is witnesses upon material matters, as, for instance, the statement by Nana that Bhagwantrao said he had no money, but that e would "find a creditor" for Nana, and that Bhagwantrao did ake him to Baloba Narayan Vagh. In other words, the deed s some evidence of the act alleged to have been done in pursuance of Nana's interview with Bhagwantrao, and it is material n the question whether the evidence of Nana and his witnesses n this part of the case can be relied upon.

While dealing with this part of the case, their Lordships bserve that it is difficult to understand how Nana would have een able to negotiate the arrangement culminating in the deed f the 6th June, 1910, without assistance from some one.

He was illiterate, he had been living away from Bhamburda since he was a boy, he would not have sufficient knowledge of is own to enable him to describe the parcels of immovable property which are so fully set out in the deed, and it is extremely unlikely that a man in Nana's position would be able to negotiate with Baloba Narayan Vagh on his own account and without being introduced and assisted by some responsible person.

Baloba Narayan Vagh, according to the evidence of one of is sons, was on friendly terms with Bhagwantrao and lived on Bhagwantrao's land. This is the person to whom Nana said in his evidence Bhagwantrao took him.

Apart from the particular recital in the deed as to the nterview with Nana's uncles about a year ago, the deed itself is

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material corroboration of the plaintiffs' case and was admissible in evidence.

It appears that in 1912 Nana instituted a suit against Baloba Narayan Vagh and Bhagwantrao, treating the abovementioned sale-deed as a mortgage, and alleging undue influence on the part of Bhagwantrao. He prayed for a declaration that the deed was a mortgage and that joint possession of the property should be granted. In his written statement delivered in October, 1912, Bhagwantrao denied that Nana was entitled to any share in the joint family property. This is the first occasion, of which there is any reliable evidence, when Bhagwantrao denied that Nana was entitled to a share in the family property.

There was no allegation at that time that Nana had been excluded from the joint family property in 1905 or 1906. That suit was withdrawn for a reason which it is not material to consider.

In 1914 another suit was filed by Nana against Baloba Narayan and Bhagwantrao, and again in his written statement Bhagwantrao denied that Nana was the son of Ramrao.

On the 13th of August, 1919, Nana executed a further sale-deed of his share in the property in favour of the first two plaintiffs. His claim that the previous sale-deed was merely a mortgage was given up and he received a further sum of Rs. 500, which, taken with the previous Rs. 1,500 and the interest thereon, was calculated to make up a total of Rs. 3,500.

The present suit was brought on the 21st of July, 1920.

The issue in this appeal is whether the suit was barred by reason of Article 127 of the First Schedule of the Indian Limitation Act (IX of 1908).

The article is as follows:—

Description of Suit.	*Period of limitation.*	*Time from which period begins to run*
127. By a person excluded from joint family property to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff.

The questions arising upon the above-mentioned article are:

(1) whether Nana was excluded from the joint family property;

(2) if he was so excluded, when did such exclusion take place;

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(3) when did the exclusion, if any, become known to Nana.

As regards the first and second questions, it was argued on behalf of the contesting defendants that it should be held that Nana was excluded from the joint family property from the year 1898, when he went to live with his maternal uncle after his mother's death, and reliance was particularly placed upon the facts that after that date Nana never resided in the family welling-house, he received no maintenance or education from members of the joint family, who did not provide anything towards the expenses of his marriage, and that for many years he did not exercise his right to partition.

The above-mentioned facts are certainly material for consideration, but in their Lordships' opinion they are not conclusive on the question of exclusion of Nana from the joint family property.

There is no definition of the word "exclusion" in the Limitation Act, and it is obvious that the question whether a person has been excluded from joint family property must depend upon the facts of the particular case which is under consideration. It was admitted in argument by the learned counsel for the defendants that an intention to exclude is an essential element. Their Lordships are of opinion that the above-mentioned admission is correct, and that it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude Nana.

Their Lordships are of opinion that there was no evidence which would justify them in holding that Nana was excluded from the joint family property in 1898.

The evidence goes to show that the departure of Nana from the family dwelling-house in 1898 with his maternal uncle was voluntary. He was in no sense turned out. He went with the consent of Bhagwantrao. The reason for his departure is obvious: his father and mother were dead, he was only twelve years old, and, as the learned Subordinate Judge pointed out, Rakhmabai ruled that branch of the family, and having regard to the state of affairs under that rule and to what had previously occurred, it may well have been thought better for Nana that he should go with his maternal uncle rather than remain in the same house with Rakhmabai.

It remains to be seen whether there is evidence of his exclusion from the joint family property after that date.

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As he grew up he helped his maternal uncle in his agriculture and then was able to get some land for himself from the Government. It is true that he was living in a humble way, and was not educated in the same way as the other members of the joint family who were living at Bhamburda, but there is nothing to show that he was dissatisfied with the conditions under which he was living. One reason given for his not visiting Bhamburda was that he did not go on account of the quarrelsome nature of his step-mother Rakhmabai.

His marriage expenses were practically nil, as his marriage took place at the same time as that of his maternal uncle's brother.

The mere fact that during the time that Nana was living with his maternal uncle the members of the joint family did not subscribe towards his maintenance, education or marriage expenses does not, in their Lordships' opinion, having regard to the facts of this case, prove that those in control and possession of the joint family property intended to exclude him from his share of the joint family property. It is consistent with the evidence that the members of the joint family, who were in control and possession of the joint property, though willing to allow Nana to be maintained at the expense of his maternal uncle, never did anything to indicate to Nana or anyone else that they intended to exclude him from his share in the joint family property.

It is not necessary to refer in detail again to the facts of the case: it is sufficient for their Lordships to say that up to the time when Nana attained his majority in 1904 they are consistent with there having been no intent to exclude Nana from the joint family property and no exclusion in fact.

In 1904 Nana attained his majority. Their Lordships cannot find any reliable evidence that there was any change in the position until 1909.

The defendants' attempt to prove a demand by Nana in 1905 or 1906 and a refusal by his paternal uncles entirely failed. It is material to notice that Abba, the maternal uncle of Nana, was not asked in cross-examination if he had told Nana that he was entitled to a share in the joint family property, or had drawn his attention to the advisability of claiming his share: a question which their Lordships would have expected might usefully have been put to Abba.

In short, with the exception of the alleged demand in 1905 or 1906 (the proof of which failed), their Lordships' attention

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was not drawn to any act or acts during the period from 1904 to 1909 which would indicate an exclusion of Nana from his right to share in the joint family property.

Their Lordships have no doubt that in or about 1909 Nana did go to Bhamburda and did assert his right to a share in the joint family property.

It was argued on behalf of the defendant-respondents that the recital in the deed of the 6th of June, 1910, *viz.*, "that they refused to give (my) share," was inconsistent with Nana's evidence.

Their Lordships do not take that view, and are of opinion that the said recital, when read with the other terms of the deed, in which it was alleged that Nana had asked his uncles and his step-brothers to effect a partition and to allot to him a one-ninth share, so far from being inconsistent with Nana's evidence, may be said to be corroborative thereof.

If Nana's evidence is accepted *in toto,* there was not, even in 1909, any denial by Bhagwantrao of Nana's right to a share, but merely a refusal to partition the property at that time, and their Lordships are of opinion that the sale-deed of 1910 does provide material corroboration of Nana's evidence that up to that time there was no exclusion of Nana from the joint family property.

Even if it be taken that the refusal on the part of Bhagwantrao in 1909 or 1910 to agree to a partition was based on an allegation that Nana was not entitled to share in the joint family property, and that it did amount to an exclusion of Nana from such property, the suit was brought within twelve years and was in time.

The conclusion of their Lordships on this part of the case is that the evidence is consistent with there having been no exclusion of Nana from the joint family property before 1912, and that being so, the defendants have not discharged the onus of proving the exclusion on which they relied.

In view of this opinion, it is not necessary to consider the third question above mentioned. Their Lordships, however, desire to observe that, with regard to the third question, even assuming that the facts relied upon by the defendants could be said to amount to exclusion, the defendants have failed to prove that Nana was aware more than twelve years before the institution of the suit of any intention on the part of the members of the joint family to exclude him from the joint family property when he should choose to assert his rights.

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In considering the whole case, it is not immaterial to remember that the main defence of the contesting defendants was that Nana was not a member of their joint family, that the further case made was that he was definitely refused a share in 1905 or 1906, and that both these allegations have been held to be unfounded.

For these reasons their Lordships are of opinion that this appeal should be allowed, that the decree of the High Court should be set aside, and the decree of the Subordinate Judge should be restored.

The respondents 1 to 5 should pay the costs of the plaintiffs of this appeal and of the appeal to the High Court, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE

V.R.S.A.R. Arunachalam Chettiar .. *Assessee**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

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Arunachalam Chettiar v. Commissioner of Income-tax, Madras.

Indian Income-tax Act (XI of 1922), Ss 4, 14, 16 and 26—Foreign firms whose profits are taxable under S 4 (2)—Applicability of S. 26—Joint Hindu family—Partition—Allotment of foreign business to the share of one member—Remittance of profits to British India both before and subsequent to the date of partition—Period of assessment earlier than the Amending Act III of 1928—Member who got the foreign business for his share if can be assessed to income-tax in respect of the remittances.

Section 26 of the Indian Income-tax Act is applicable in the case of foreign firms whose profits are brought into British India and are taxable under S 4 (2) of the Act

Where one of the members of a joint Hindu family becomes entitled on partition to a foreign business for his share in the family properties, the profits received by him from that business subsequent to the date of partition during the year of account in which the partition takes place are taxable, but he cannot be assessed for income-tax in respect of the profits received by the joint family before the date of the partition during the same year, where the period of assessment is earlier than the amendment introduced by Act III of 1928

Case stated by the Commissioner is as follows:—

I have the honour to refer the following case for the opinion of the Hon'ble the Judges of the High Court under section 66 (3) of the Indian Income-tax Act, 1922.

*O.P. Nos. 127 and 217 of 1928. 26th March, 1929.

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2. The petitioner Arunachalam Chettiar is a Nattukottai Chetti residing at Kilasevalpatti in the Ramnad district within the jurisdiction of the Income-tax Officer, Second Circle, Karaikudi.

3. Till November, 1925, he was a member of an undivided Hindu family carrying on money-lending business at Rangoon and Myingyan in Burma, Penang in the Straits Settlements and Taiping and Sungeipattani in the Federated Malay States. The business at Taiping was a partnership of four persons in which the family had a 50|76ths share. On 5th November, 1925, the family became divided and at the partition the family's interest in the business at Taiping was allotted to the share of the petitioner.

4 The petitioner carried on the business at Taiping with the other partners throughout the year 1925-26. In August, 1926, one of the other partners ceased his connection but the business was continued by the applicant with the other partners.

5. During the year 1925-26 remittances were made from Taiping to British India to the extent of Rs. 44,255, out of which Rs. 29,218 was sent prior to the date of partition and received by the joint family and Rs. 15,037 was remitted subsequent to the partition to the petitioner. It is admitted that the profits of the business were more than the remittances, and that such profits accrued or arose to the joint family prior to the partition.

6. In 1926-27 the Income-tax Officer proposed to treat the entire amount remitted as profits received in British India during the year of account 1925-26. The petitioner objected that the remittances must be treated as capital allotted to him at the partition and could not be treated as his income. The Income-tax Officer held that the petitioner had succeeded to the business of the family at Taiping and was therefore under sections 4 (2) and 26 of the Income-tax Act liable to pay tax on the profits of the family remitted to British India. He accordingly assessed him on an income of Rs. 45,931 made up as under and levied tax amounting to Rs. 4,306-1-0.

		Rs.
Property		100
BUSINESS.		
Headquarter money-lending	1,576	
Remittances from Taiping	44,255	
		45,831
Total Rs. ..		45,931

7. The petitioner appealed to the Assistant Commissioner who while upholding the Income-tax Officer's view that the remittances made to the family were taxable in the hands of the applicant, considered that, in accordance with the decision of the Allaha-

bad High Court in the case of *In the matter of Begg Sutherland & Company, Limited*[1] the profits of the Taiping business to which he succeeded should be computed and taxed separately. He accordingly reduced the tax payable by the applicant to Rs. 2,609-9-0 as under.

	Rs.	A.	P.
Tax at 1 anna in the rupee on Rs. 29,218 remitted to the family	1,826	2	0
Tax at 9 pies in the rupee on the other income of the petitioner, *viz.*, Rs. 16,713 (which includes the Rs. 15,037 referred to in paragraph 5) ..	783	7	[illegible]
Total Rs. ..	2,609	9	0

8. The petitioner required me under section 66 (2) of the Act to refer certain questions of law for the decision of the High Court. In my letter No. 534 of 1927, dated 24th August, 1927, I referred four questions and by an order of the same date I refused to refer the other questions. One of those was "whether what was got by an individual for his share in the partition amongst the family members is not capital to him and whether the sums divided among the family members is not capital to him and whether the sums divided among the family members in the course of partition will retain the character of profits, if any, even after the sums came into the hands of the divided members."

9. The petitioner subsequently moved the High Court under section 66 (3) of the Income-tax Act and contended that the correctness of the assessment made on him individually on a remittance of Rs. 15,037 received by him subsequent to the partition depended on a demonstration of the question referred to in paragraph 8 above. In the order quoted above I have been directed to state a case and refer the following question:

> "Whether in a partition effected between the members of a Hindu joint family, the properties and assets allotted to each co-parcener would not be capital assets in his hands and whether any sums of money received by the separated co-parcener from a business out of British India allotted to him under the partition would be assessable as a remittance of the profits of the business earned prior to partition."

Before I proceed to give my opinion on the question that I have been directed to refer I respectfully invite the attention of their Lordships to this preliminary question "Whether the petitioner is entitled to move the High Court for a direction to the Commissioner to refer a question of law which was not raised before him in the course of proceedings under section 66 (2) of the Income-tax Act." In Referred Case No. 16 of 1927 (*The Commissioner of Income-tax, Madras* v. *P. Thiruvengada*

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1. (1925) I.L.R. 47 A. 715.

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Mudaliar[2]) a Full Bench of this Court has held that an assessee cannot be allowed to argue before the Court a question of law which was not raised before the Commissioner in an application under section 66 (2). In the present case it will be seen that the question which the petitioner seeks to raise before the High Court is not the same as one which he required me in his application under section 66 (2) to refer to the High Court except perhaps in regard to the first branch of the question now raised. This branch of the question, though phrased a little differently, seems to be in substance the same as the question raised before me, but except to that extent I venture to submit that the question now raised should not be made the subject-matter of decision in this case.

I now proceed to give my opinion on the question that I have been directed to refer.

The petitioner's contention is—

(1) that the share in the business at Taiping which was allotted to him at partition was one of the assets of the family and therefore capital,

(2) that the accumulated profits at Taiping which came under his control as a result of the partition must be regarded as a portion of this asset; and therefore

(3) that any subsequent drawing upon those profits constitutes a withdrawal of his capital.

The first part of this argument need not be disputed. The second part implies that the petitioner received the accumulated profits at partition. In my opinion this is not an accurate statement. What he received at partition was the right to draw upon those profits. The profits did not, I think, lose their character as such merely because the right to draw upon them was transferred to the petitioner. Their character as "profits and gains of a business accruing or arising without British India to a person resident in British India" to use the language of section 4, sub-section (2), was not affected by the partition. The conclusion that in drawing upon the profits accumulated by the family the petitioner was really withdrawing part of the capital of the foreign business is therefore, in my opinion, incorrect.

The above is my opinion on the first part of the question. The second part of the question, as has been observed already, is new. If it is meant to be a mere expansion of the first, that part is answered above. If it is intended to raise new points those points were not raised before me when I refused to make the reference and I therefore find myself unable to express an opinion on them.

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2. (1927) 55 M.L.J. 19 (F.B.).

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K. S. Krishnaswami Aiyangar with *P. R. Srinivasan* for assessee.

M. Patanjali Sastri for Referring Officer.

The Court delivered the following

JUDGMENTS. *Kumaraswami Sastri, J.*—The assessee prior to the 5th November, 1925, was a member of a joint undivided family consisting of his father and brothers. The joint family so constituted was entitled to 50|76ths share in a money-lending business carried on at Taiping in the Federated Malay States. On the 5th November there was a partition amongst members of the joint family and in that partition the interest of the family in the Taiping business as a going concern fell to the share of the assessee. Prior to the date of the partition there had been a remittance to the joint family of Rs. 29,218 in the year Krodhana (13th April, 1925 to 12th April, 1926). Subsequent to the partition there was a further remittance of Rs. 15,037. These sums were remitted not in one lump sum, but that makes no difference.

The year of account in the present case is Krodhana (13th April, 1925 to 12th April, 1926), and the year of assessment 1926-27. The accounts were kept on cash basis.

The Income-tax Officer overruled the objections of the assessee and assessed the assessee on these sums as being foreign profits brought into British India and taxable under section 4 (2). Hence this reference.

The contention for the assessee is that, as he got the Taiping business for his share of the joint family, what he got was capital and that he could not be taxed as having received any profits. It is also contended that as the moneys were received by him as a member of the joint family, he could not be taxed, and it is the joint family that should be taxed and not the assessee individually, that under section 14 of the Income-tax Act he is not liable to assessment, that the fact that the joint family ceased to exist during the year of assessment does not make any difference so far as he is concerned, that there was no provision in the Act for taxing the joint family dissolved during the year of assessment or account, and that this defect has only been removed by sections 25 (*a*) and 26 inserted by an amendment of the Act (III of 1928). It is also contended that section 26 can have no application as the firm is situate outside British India and it is only the income that is brought into British India that is taxable.

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There is no dispute about the facts as set out. Section (2) enacts that

'profits and gains of a business accruing or arising without British India to a person resident in British India [shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brouht] notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose''

It is therefore clear that had the joint family of which the assessee was a member continued without partition during the year of assessment, the joint family would have been taxable in respect of the sums of Rs. 29,218 and Rs. 15,037 received in British India, as it is not disputed that the members of the joint family were residents in British India and that the sums remitted were profits.

Section 26 as it stood in 1925-26 ran as follows:—

''Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment.''

I do not think that the contention that section 26 has application only to firms in British India and has no application to firms outside British India can be accepted.

Section 4 (1) makes the profits of a company outside British India taxable if brought into British India. There is nothing in section 26 which limits the scope of the section to firms in British India. Section 4 declares that the income of a foreign firm is taxable. In dealing with the income which is so taxable and determining who is the person to pay the tax, there is no reason why the provisions of section 26 should not be applicable. Section 26 only deals with the persons who are to be assessed. Where there is a change, I am of opinion that section 4 enacts when the profits of a foreign firm are taxable and section 26 states whom you have to reach to collect the tax. The mere fact that the firm if it brought no profits into British India would not be taxable does not affect the question. Any enquiry for the purpose of ascertaining whether the sum is taxable or not and whether it is profits or capital got back and who is to pay the tax is within the scope and jurisdiction of the Income-tax officers, and for that purpose the accounts of the foreign firm may be scrutinised. It is not therefore correct to

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say that in the case of foreign firms whose profits are brought into British India and taxable under section 4 (2), the other provisions of the Income-tax Act are inapplicable.

The next question is whether in the case of partition of an undivided family, the members of which are carrying on business, section 26 applies, where during the year in question the business falls to the share of one or more of the members. Having regard to the wording of section 26, I do not see anything to prevent its application. Prior to the partition, all the members of the joint family constituted the firm. By reason of the partition certain members who constituted the firm ceased to have any interest in the firm and their interest by reason of the partition devolved on the person or persons to whom their shares in the business have been allotted. It is difficult to distinguish this case from the case of an ordinary partnership where, there are say, four parties and three of them retire from the business assigning their interest to the fourth partner and the fourth partner continues the business. I am of opinion that in cases where there has been a partition of an undivided Hindu trading family, section 26 applies and the person who becomes entitled to the business during the year in question cannot escape liability unless he can bring himself within any other section exempting him from liability.

The next question is whether in the case of a partition amongst the members of a joint family where a person becomes entitled on partition to a foreign business as his share, the profits earned in the year in which the partition takes place lose the character of profits as being merged in the capital and should be treated as the capital of the person who gets the business on partition.

The argument of Mr. Krishnaswami Aiyangar for the assessee is that where a partition takes place between the members of an undivided family, a person in consideration of his share in all the joint family properties gets a particular item which presumably is equivalent to his share in the properties which were clubbed together for ascertaining his share and therefore it should be taken that what he gets is not profits or capital in the business but the value of the whole of the business as representing his share and so far as he is concerned it is his capital.

It is argued that the position is similar to that where a limited company is wound up and the assets distributed, where

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there is no question of taxable profits as regards the shareholders to whom the assets are distributed.

Reference has been made to *Inland Revenue Commissioners v. Burrell*,[3] where it was held that on the winding up of a limited company, the undivided profits of past years and the year in which the winding up occurred, were assets and not profits for the purpose of taxation and to *Inland Revenue Commissioners v. Blott. Inland Revenue Commissioners v. Greenwood*,[4] where it was held that where a limited company passed a resolution that out of its undivided profits a bonus should be paid to the shareholders and that such payment should take the form of certain shares being allotted to them, the shares so allotted could not be treated as part of the total income for the purpose of super-tax.

I do not think the principle of these cases has any application to cases where on a partition between the members of a joint family a business as a going concern is allotted to a share of one member. It is not suggested in the present case that, when the business was allotted, the accounts of the business were closed, profits ascertained and such ascertained profits added to the capital and a new business in which this capital was invested was carried on. Nor is it suggested that the business was wound up. The profits remained as profits, the business went on as before and the only change was that instead of all the members of the joint family being interested in the business, one of them acquired the interests of the others and became the sole proprietor. So far therefore as the sum of Rs. 15,037 received by the assessee after the partition is concerned, I am of opinion that it is taxable.

As regards the sum of Rs. 29,218 received before the partition, it is not disputed that this sum was received by the joint family of which the petitioner was a member, and it seems to me that having regard to the provisions of sections 14 and 16 the assessee is not taxable.

In a case like the present we should read sections 4 (2), 14, 16 and 26 together. No doubt section 26 says that, when there is a change, the person liable is the person engaged in the business at the time of making the assessment. But the section does not prevent him from claiming any of the exemptions conferred by the other sections of the Act.

3. (1924) 2 K.B 52.

4. (1921) 2 A.C. 171.

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Section 14 (1) runs as follows:—

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family

(2) The tax shall not be payable by an assessee in respect of—

(*a*) any sum which he receives by way of dividend as a sharehol in a company where the profits or gains of the company have been assess to income-tax, or

(*b*) such an amount of the profits or gains of any firm which have been assessed to income-tax as is proportionate to his share in the firm."

It will be noted here that, while sub-clause (2) only exempts cases where a company or a firm has already been assessed, sub-clause (1) puts no such limitation but states generally that the tax shall not be payable by an assessee in respect of any sum which he receives as a member of an undivided Hindu family.

Provision is made in section 3 for the taxation of undivided Hindu families, and it says that income-tax can be charged on the income, profits and gains of the previous year of every individual, company, firm and Hindu undivided family.

Section 16 (1) runs as follows:—

"In computing the total income of an assessee sums exempted under the proviso to sub-section (1) of section 7, the provisos to section 8, sub-section (2) of section 14 and section 15 shall be included"

Here again it will be noted that section 14 (1) is not to be included, *i.e.*, any sum received by a member of an undivided Hindu family.

There was no provision in the Act until the recent amendment by which undivided families which became divided during the course of the year could be reached. To remedy this defect the legislature amended the Act by enacting section 25-A and by recasting section 26 of the old Act. Clause 1 of section 25-A provides for an enquiry by the Income-tax Officer when a partition is alleged, and an order by him as to whether he finds the partition proved. Clause 2 runs as follows:

"Where such an order has been passed, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; * * * * * * * * *Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such."

In my view the provisions of sections 14 and 16 being clear and the amendment introduced by Act III of 1928 being much later than the period for which the income has been assessed, no consideration as to the inconvenience or as to any person escaping from taxation can arise There is no ambiguity in the sections and the clear meaning of section 14 (1) is that where a member of an undivided Hindu family during the period when the family is joint receives any portion of the income of the joint family, he is not liable to taxation but it is the joint family which under section 3 should be charged. This is not a case where we have to construe a doubtful section.

In *Partington* v. *Attorney-General*[5] Lord Cairns observed as follows:—

"I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

As observed by Lord Halsbury in *Lord Advocate* v. *Fleming*[6] in construing such Acts we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed is that which the legislature has enacted.

Reference has been made by Mr. Patanjali Sastri to section 5 (1) (*f*) of the Act of 1886 and section 12 (1) of the Act of 1918 and it is argued that all that was done by section 14 (1) of the present Act was to prevent double taxation and that if the undivided family ceased to exist, there is no reason for the individual member who receives the sum not being taxed.

In the present case I fail to see any reason why one member of an undivided Hindu family should be taxed for a sum received by all the members of the undivided family. The new amendment which I have referred to shows that the legislature intended that the member should only pay a tax proportionate to his share. There is no question of any equitable considera-

5 (1869) L.R. 4 H.L. 100. 6. (1897) A.C. 145.

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tion in cases where one member of an undivided family after partition is sought to be made liable to pay tax on the whole sum which he and the other members of the family received before partition irrespective of his share. However this may be, it seems to me having regard to the decisions I have referred to we cannot in a fiscal enactment where the language is clear go beyond the plain meaning of the section. It is very probable that in the Income-tax Act of 1922 the legislature by oversight or owing to bad draftsmanship omitted to prescribe for cases where there has been a partition in an undivided family, but it has now been remedied by Act III of 1928. I do not think I can by any rule of construction practically make section 25-A retrospective by enacting that the same principle is to be applied to cases coming under the Act of 1922.

I am of opinion that the assessee is not taxable as regards the sum of Rs. 29,218 received before the partition by the joint family. Rs. 100 paid in O.P. No. 127 of 1928 will be refunded by the Commissioner.

Odgers, J.—I agree.

Wallace, J.—I agree.

N.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Narayana Sahu and another .. *Petitioners* (Respt.—Plff. and nil)*

v.

Kraleti Pentamma *alias* Appalanarasimham .. *Respondent (Petitioner—Defendant).*

Narayana Sahu v. Pentamma.

Civil Procedure Code (V of 1908), O. 21, Rr. 89 and 92—Application to set aside sale—Omission to implead the auction-purchaser in the application—Subsequent impleading of the auction-purchaser after 30 days—Application otherwise in order and in time—Validity

In an application to set aside a sale under Order 21, Rule 92 of the Civil Procedure Code read with Rule 89 which is otherwise in order and in time, the omission to implead the auction-purchaser till after the expiry of 30 days allowed for the application is not fatal to it

Ganesh Bab Naik v Vithal Vaman, (1912) I L.R. 37 B 387 followed

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*C.R.P. No 1097 of 1927. 22nd April, 1929

Narayana Sahu v. Pentamma.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Vizagapatam, dated 25th October, 1926, in A.S. No. 237 of 1926 (E.P. No. 1345 of 1925 in E.A. No. 416 of 1926 in O.S. No. 299 of 1923 on the file of the Court of the District Munsif of Rajam).

V. Govindarajachari for petitioners.

Y. Suryanarayana for respondent.

The judgment of the Court was delivered by

Krishnan Pandalai, J.

Krishnan Pandalai, J.—This matter has been posted before a Bench owing to the absence of any clear ruling in this Court on the point involved, *i.e.*, whether in an application to set aside a sale under Order 21, Rule 92 read with Rule 89 which is otherwise in order and in time the omission to implead the auction-purchaser till after the expiry of 30 days allowed for the application is fatal to it. The facts are simple and undisputed. Property was sold in execution of a decree on 12th April, 1926. On 28th April, 1926, the defendant's pleader filed a lodgment schedule mentioning in the cause-title the names of the plaintiff (decree-holder) and defendant (judgment-debtor) and the auction-purchaser who was the decree-holder's son and praying for an order to deposit the amount required by Order 21, Rule 89 and stating that the amount was deposited for setting aside the sale. The challan was accordingly issued and the amount was deposited on 11th May within 30 days. The Court had been closed from 2nd May and reopened on 14th June, on which day the defendant filed a petition headed Order 21, Rule 2, showing in the cause-title the names of the plaintiff and defendant only, but for some reason, probably by inadvertence, omitting the name of the auction-purchaser and stating that the proper amount had been deposited in the Treasury as per receipt produced and praying that full satisfaction of the decree may be entered and that the sale should be set aside. The plaintiff to whom notice of this application was sent raised various objections most of which were unfounded, *e.g.*, that the sum due was not deposited and the application was not filed in time, but he also raised the objection that the auction-purchaser (his own son) had not been impleaded. Thereupon notice of the application was sent to the auction-purchaser also and served on 30th June, 1926, some days after the expiry of the 30 days allowed for application under Order 21, Rule 92. The Dis-

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trict Munsif held that the deposit was in time and set aside the sale. The learned District Judge confirmed the order.

In this Court the only point pressed is that it is necessary in applications under Order 21, Rule 92, that the party to be prejudicially affected by the order, *e.g.*, the auction-purchaser, should be impleaded and notice sent to him and that unless the applicant has impleaded the auction-purchaser within the time allowed the application is time-barred and unsustainable. Our difficulty in deciding the question on the words of the relevant rules themselves which should be the ultimate basis of decision on such a question, is the wealth of conflicting judicial opinion on it. The petitioner's advocate referred to the following cases in his favour:—*Ajiuddin Ahamed* v. *Khoda Bux Khondkar*,[1] *Sumitra Kuer* v. *Damri Lal*[2], *Karamat Khan* v. *Mir Ali Ahmed*[3] and *Khoda Bux* v. *Sadu Pramanick*.[4] The respondent's advocate referred to the following decisions *contra*:—*Ganesh Bab Naik* v. *Vithal Vaman*,[5] *Raj Chandra Das* v. *Kali Kanta Das*[6], *Mussammat Bibi Zainub* v. *Paras Nath*[7], *Iswardas Marwari* v. *Biseswar Lal*,[8] *Satish Chandra De Sarkar* v. *Rakhal Chandra Saha*[9], *Haji Muhammad* v. *Ghulam Hussain Khan*[10] and *Kirpa Ram* v *Nand Lal*.[11] In our own Court there are no reported decisions but reference has been made to A.A.O. No. 19 of 1919 in which the learned Judges differed.

In our opinion all that Order 21, Rule 92 read with Rule 89 requires before an order setting aside a sale is made is, (1) an application within the time allowed praying that relief; (2) deposit in Court of the sum required by Rule 89 (1) (*a*) and (*b*) within the time allowed; and (3) notice of the application to all persons affected, of whom the auction-purchaser is one. There is nothing in the rules themselves which requires that the names of the parties affected including that of the auction-purchaser should be contained in the application or added within any particular time, although nominally it is the usual, because the most convenient, plan for the applicant to mention those of them whom he knows at once in the application so that notice may go to them without delay. In *Ganesh*

1 (1919) 50 I C 5
2. (1921) 62 I.C. 61
3 (1891) A.W.N. 124.
4 (1910) 14 Cal. L J 620 at 625.
5. (1912) I L R 37 Bom 387
6 A I R 1923 Cal 394
7 (1923) I.L.R. 2 Pat. 800
8. (1925) 94 I C 31
9 (1927) 47 Cal L J 62 at 64
10 A I R 1927 Lah 681
11. A.I.R 1928 Lah 413

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Bab Naik v. *Vithal Vaman*[5] the auction-purchaser was not made a party to the original application or to the appeal though notice was issued to him by the first Court and he was added as party to the appeal under Order 41, Rule 20. On this point the Bombay High Court observe (p. 390) that according to Order 21, Rule 92,

"Where in the case of an application under Rule 89 the deposit required by that rule is made within 30 days from the date of the sale, the Court shall make an order setting aside the sale provided that no such order shall be made unless notice of the application has been given to all persons affected thereby. That cannot mean that notice must be given within 30 days of the date of sale."

We respectfully agree with this view and hold that the notice given in this case to the auction-purchaser was not infructuous, because his name was not added to the petition, dated 14th June, 1926, and notice to him was applied for only after the expiry of 30 days from the date of the sale.

In order to mitigate the hardship that is sure to arise from a strict adherence to the opposite view, some decisions have gone to the length of laying down that it is enough if the auction-purchaser's name is mentioned somewhere in the body of the judgment-debtor's application though not in the cause-title as one of the parties (see *Raj Chandra Das* v. *Kali Kanta Das*[6] and *Mussammat Bibi Zainub* v. *Paras Nath*[7].) We think that it is not correct to adopt a rule not justified by the language of the Code and then attempt to mitigate the hardships thereby created by tolerating its infringement. But if the substance of the matter is that the judgment-debtor must do all that he is required by law to do and no more within the time limited and then the Court must pass the order after notice to the persons affected, the fact that in this case in the lodgment schedule, dated 28th April (*i.e.*, 16 days after the sale) the auction-purchaser was mentioned and it was also stated that the amount is to be deposited for setting aside the sale and the fact that the deposit was in fact made within 30 days of the sale were quite sufficient to meet the requirements of the law in any view of the case. The Civil Revision Petition is dismissed with costs.

N. S. *Civil Revision Petition dismissed.*

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5 (1912) I.L.R. 37 B. 387. 6 A.I.R. 1923 Cal. 394.
7. (1923) I.L.R. 2 Pat. 800.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Marimuthu Pillai .. *Appellant**
(1st Defendant)

v.

Gopalakrishna Aiyar and another .. *Respondents*
(Plff. and 2nd Deft.).

Marimuthu Pillai v. Gopalakrishna Aiyar.

Interest—Post diem *interest—Mortgage bond—Provision for repayment of principal in two years—Provision for payment of interest once in six months and interest upon interest in arrears*—Post diem *interest, if can be awarded.*

Where a mortgage document, after stating that the mortgage amount would be paid within a period of two years, contained a provision for payment of interest at nine per cent per annum once in six months and a further provision that, if interest be not regularly so paid, the interest in arrears should carry interest at 12 per cent. per annum.

Held that, in a suit upon a mortgage, *post diem* interest as well as interest upon interest was awardable subsequent to the date fixed for the payment of the principal amount.

Interpretation of the Privy Council judgment in *Mathura Das* v. *Raja Narindar*, (1896) L.R. 23 I.A. 138 : I.L.R. 19 All. 39 : 6 M.L.J. 214 (P.C.) by the Allahabad High Court in *Balwant Singh* v. *Gayan Singh*, (1913) I.L.R. 35 All 534 not approved.

Second Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A.S. No. 78 of 1924 (Appeal No. 341 of 1924, District Court, West Tanjore) preferred against the decree of the Court of the District Munsif of Tanjore in O.S. No. 264 of 1923.

P. S. Ramaswami Aiyangar for appellant.

N. Swaminathan for 1st respondent.

The Court delivered the following

JUDGMENT:—The 1st defendant is the appellant before me, and the only question that arises in this Second Appeal is whether the plaintiff, the hypothecatee, is entitled to *post diem* interest after 23rd May, 1911, the date for payment fixed in the document. The document recites that the mortgagor borrowed Rs. 1,000 from the mortgagee, and it states that the amount would be paid within a period of two years, namely, 23rd May, 1911. There is also a provision as regards payment of interest once in six months, and a further provision that, if interest be not regularly so paid, the interest in arrears should carry interest at 12 per cent. Contrary to the expectations of the parties, the mortgagor did not pay the amount in 1911, the

*S.A. No. 1562 of 1925. 16th April, 1929.

Mailmuthu Pillai v. Gopalakrishna Aiyar.

period of two years fixed in the document, and the suit was instituted by the mortgagee in 1923 to recover the principal, interest, and interest on interest as provided in the document. Both the Lower Courts have held in favour of the plaintiff as regards *post diem* interest. The District Munsif however held that the rate to be awarded as interest on arrears of interest should be restricted to 9 per cent., whereas the Lower Appellate Court held that the same should be paid at the rate of 12 per cent. as provided in the document.

The learned Advocate for the appellant contends that no *post diem* interest at all is payable if the document be properly construed. He also criticises the award of interest upon arrears of interest by the Lower Appellate Court. There are considerations mentioned in the judgment of the Privy Council reported in *Mathura Das* v. *Raja Narindar*[1] which would warrant the award of *post diem* interest. I may at once answer the preliminary argument of the learned Advocate for the appellant by saying to be consistent I should either disallow all *post diem* interest after 1911, or allow *post diem* interest *plus* interest on interest as provided in the document. Both the Lower Courts have construed this document as entitling the plaintiff, the hypothecatee, to *post diem* interest, and after consideration I think they are right. The ordinary presumption in such cases is this —though a period is fixed for payment of the amount due and though the mortgagor hoped to be able to discharge the amount due on or before the fixed period, the Courts having regard to the ordinary intentions of parties and common course of conduct are entitled to presume that the real intention was that interest should be paid till the amounts are actually repaid, and as put by Sir Kumaraswami Sastri, J., in *Agnes Isabella Campbell* v. *Audikesavulu Naidu*,[2] "unless there be anything in the document which necessarily indicates that the parties did not intend to pay *post diem* interest," the tendency of the Courts has been to award such interest.

My attention has been drawn to two cases decided by this Court, *viz.*, *Narasimhayya* v. *Srinivasayya*,[3] (Sadasiva Aiyar and Spencer, JJ.) and *Ghantayya* v *Papayya*[4] (Subramania Aiyar and Moore, JJ.). In the second of these cases, reference was made to a Calcutta decision where Maclean and Banerji, JJ. observed that "in a simple mortgage transaction it is not an

1. (1896) L R. 23 I.A. 138 I.L.R 19 A. 39· 6 M.L J. 214 (P C.)
2 (1924) 20 L.W. 153. 3 (1918) 36 M.L.J. 118.
4 (1899) I.L.R. 23 M 534.

unusual intention, that if the principal money be not paid by the stipulated time, interest should continue to run and run at the stipulated rate.'' Having regard to the decisions which have laid down that, unless intention to the contrary be clear, interest should be decreed by Courts till payment of the debt, I think that the Lower Courts have rightly come to the conclusion that in this particular case the plaintiff is entitled to interest as claimed.

Finally, the learned Advocate for the appellant wanted to restrict the operation and scope of the ruling of the Privy Council reported in *Mathura Das* v. *Raja Narindar*[1] by drawing my attention to the circumstance that as a matter of fact in that particular case the mortgage deed contained a provision that the mortgagor would not alienate the property till the amount due to the hypothecatee had been paid; and it was argued that it was owing to the existence of such condition that the Privy Council held that *post diem* interest was awardable. I am unable to accept this contention This Privy Council decision has been considered in *Narasimhayya* v. *Srinivasayya*,[2] *Ghantayya* v. *Papayya*[4] and *Agnes Isabella Campbell* v. *Audikesavulu Naidu*.[3] I am not able to say that the learned Judges who decided those cases understood the Privy Council decision in the way in which the learned Advocate for the appellant wants me to understand the same. No doubt he was able to draw my attention to a decision of the Allahabad High Court, *Balwant Singh* v. *Gayan Singh*,[5] where the learned Judges of the Allahabad High Court do say that in the absence of such provision in the mortgage deed as existed in *Mathura Das* v. *Raja Narindar*,[1] the Allahabad High Court was not prepared to award *post diem* interest. But having regard to the decision of this Court and having regard to the reasons contained in the Privy Council decision, I am inclined to think that the learned Judges of the Allahabad High Court have (speaking with all respect) put rather too restricted a construction on the decision of the Privy Council reported in *Mathura Das* v. *Raja Narindar*.[1]

For the reasons I have mentioned, I think that the Lower Appellate Court was right in allowing *post diem* interest and also interest on interest at the rates mentioned in the document, and I accordingly dismiss the Second Appeal with costs.

N.S. *Second appeal dismissed.*

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1. (1896) L.R. 23 I.A. 139: I.L R. 19 A 39: 6 M.L.J. 214 (P.C)
2 (1924) 20 L.W. 153
3 (1918) 36 M.L J. 118
4 (1899) I.L.R. 23 M 534
5. (1913) I.L.R. 35 A. 534.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

A. Raheem Saheb .. *Petitioner** (*Accused*).

Raheem Saheb, *In re.*

Madras Local Boards Act, S 221—Fee levied by Board—Illegality of—Plea of—Permissibility of—Jurisdiction of Magistrate to decide upon—Sections 188, 184—Union Board—Stand for buses provided by—Fee in respect of—Levy of—Power of.

It is open to a party appearing before a Magistrate under section 221 of the Madras Local Boards Act to allege and prove that the fee claimed is not due from him under or by virtue of the Act, and the Magistrate has jurisdiction to consider the legality of the fee.

A Union Board provided a stand for buses and prescribed fees for the use thereof *Held*, that the fee was not legally leviable.

Quaere: Whether Union Boards could, under S. 188 of the Local Boards Act, exercise powers over anything but cartstands strictly so called

The standing of an omnibus for a few minutes periodically on the land is not the sort of occupation contemplated by S 184 of the Act.

A motor omnibus is a carriage and not a cart within the meaning of the Act A stand for omnibuses is not a public landing-place or a cart-stand within the meaning of S 184, nor is it a halting place within its meaning.

The term "Halting place" in the Act covers places like choultries and rest-houses.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Stationary Second Class Magistrate of Tindivanam in C.C. No. 662 of 1928

S. Panchapakesa Sastri for petitioner.

K. N Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This petition has been referred to a Bench owing to the doubt as to the correctness of the decision in *Ramachandran Servai* v. *President, Union Board, Karaikudi,*[1] expressed in two other cases from this Court in *In re Gopayya*[2] and *Union Board, Paramakudi* v *Chellaswami Thevar.*[3] The facts are these: The petitioner owns two motor omnibuses. The Union Board of Tindivanam have provided a stand for buses and have prescribed fees for the use thereof The fees leviable from the petitioner amount to Rs. 10 for each of his buses. He refused to pay, whereupon the Board took action against him

*Cr. Rev. Case No 914 of 1928 — 25th February, 1929
Cr R.P. No. 761 of 1928

1 (1925) I.L.R. 49 M 888 49 M.L.J. 356.
2 (1927) I.L.R. 51 M. 866, 55 M.L.J. 27. 3. (1926) M.W.N. 676.

Raheem Saheb, *In re.*

under section 221 of the Local Boards Act. Before the Magistrate the petitioner contended that the fee was not legally leviable. To that the Board replied that such a contention was not open to him. The Magistrate following *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1] held that he had no jurisdiction to consider the legality of the fee. On the merits, he was of opinion that the fee was legally leviable.

With great respect, we think that *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1] was wrongly decided. The fee to be paid under section 221 of the Act must be due to a Local Board "Under or by virtue of the Act" and it cannot be that the party called upon by the Magistrate to pay it is disentitled from pleading that it is not due under or by virtue of the Act. Take a case under section 106. The provisions of sub-section (2) are clear. No toll can be charged unless a table of tolls is put up at the toll-gate. If action is taken against a party under section 221 to recover tolls, can he not allege and prove that section 106 (2) was not complied with or must he pay and file a civil suit to recover the tolls illegally levied from him? The learned Judges thought it a startling proposition that a Magistrate should be constituted a sort of appellate authority over a Local Board, but the section gives him jurisdiction to decide that the amount charged by the Board is incorrect and there seems no reason, as Phillips, J., pointed out in *In re Gopayya,*[2] why he should not have jurisdiction also to decide that the Board is not entitled to charge anything at all We are of opinion that it is open to a party appearing before a Magistrate under S. 221 of the Act to allege and prove that the fee claimed is not due from him under or by virtue of the Act.

On the merits, we cannot uphold the view taken by the Magistrate. A motor omnibus is a carriage and not a cart within the meaning of the Act. Section 184 allows a Board to construct or provide public landing places, halting places and cart-stands. A stand for omnibuses is neither the first nor the third; nor, in our opinion, is it the second. Halting place is, no doubt, a very general term, which is nowhere defined in the Act, but it appears to us to be meant to cover places like choultries and rest-houses. Assuming that it could include stands for omnibuses, it is by no means clear that the intention of the Act was that Union Boards should, under section 188, exercise powers over anything but cartstands strictly so called. Sec-

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1 (1925) I.L.R. 49 M. 888· 49 M.L.J. 356.
2 (1927) I.L.R. 51 M. 866· 55 M.L.J. 27

tion 164 is also relied on, but that section specifically excludes public roads and we are here concerned with a public road. Apart from that, the standing of an omnibus for a few minutes periodically on the land is not the sort of occupation contemplated by the section.

Raheem Saheb *In re.*

The order of the Magistrate is set aside. The amount of fee, if levied, will be refunded.

A.S.V. *Order set aside.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Hira Lal Sahu and others .. *Appellants** (*Plffs.*)

v.

Raj Kumar Babu Lachhmi Prasad Narain Singh .. *Respondent* (*Deft.*).

Interest—Compound interest—Agreement to pay—Course of dealings between parties showing—Decree on foot of—Right to—Plaint setting up specific case of agreement to pay compound interest with annual rests inconsistent with agreement disclosed by the accounts—Effect.

P. C.

Hira Lal Sahu *v.* Lachhmi Prasad Narain Singh

The plaintiffs were members of a joint Hindu family, and they carried on a money-lending business. The defendant began to borrow money from the plaintiffs on the 20th of Pous 1310 Fasli (*i e*, January, 1903), when a sum of Rs. 300 was advanced and after the expiration of 15 months eleven days interest was debited to the account. Further sums were advanced from time to time, and the accounts were adjusted periodically, the last adjustment having taken place on the 25th Jeth 1324, corresponding to May, 1917, so that the account between the parties was running for about 14 years. Simple interest was charged upon each advance from the date of such advance until the date when the principal sum and interest were carried into a separate column of the account. The periods during which the interest was charged varied. The account was then adjusted and interest calculated on the total amount found due, so that compound interest was charged. During the time the accounts were running they were submitted to the defendant and on nine occasions he signed the accounts, the first occasion being 10th Majh 1312 and the last occasion being 25th Jeth 1324 Fasli. The accounts submitted by the plaintiffs to the defendant and signed by him as above mentioned showed the compound interest, the dates at which the adjustments respectively were made, the periods during which and the rate at which the compound interest was charged Nevertheless, in a suit by the plaintiffs to recover the balance due to them by the defendant, the High Court held that the plaintiffs were not entitled to recover the compound interest charged in the accounts. They did so on the ground that the plaintiffs had in their plaint in the suit set up a specific case of an agreement that interest should be charged with annual rests, that annual rests had not been made in the accounts,

*P.C. Appeal No. 151 of 1927. 14th May, 1929.

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and that the specific case set up had not been proved. The accounts did not, in fact, show annual rests

Held, that the High Court adopted too narrow a view of the plaintiffs' case, that the pleadings alleged an agreement by the defendant to pay the compound interest charged in the accounts which were submitted to and accepted by him, and that such agreement was proved

It is true that it was alleged in paragraph 16 of the plaint that the plaintiffs' practice was to charge interest with annual rests, but there is also a specific allegation that the defendant was informed of the claim to interest and compound interest and he accepted the claim In view of these allegations in the plaint their Lordships are of opinion that the plaintiffs are entitled to rely on the course of dealing between the parties as showing an agreement by the defendant to pay the compound interest which was in fact charged by the plaintiffs in the accounts submitted to him

Appeal No. 151 of 1927 from a judgment and decree, dated the 22nd December, 1926, of the High Court, Patna (Das and Adami, JJ.), which affirmed a judgment and decree, dated the 6th March, 1923, of the Subordinate Judge of Motihari.

The material facts of the case appear sufficiently from their Lordships' judgment.

Dunne, *K.C.* and *Dube* for appellants.

14th May, 1929. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiffs against a judgment and decree, dated the 22nd of December, 1926, of the High Court of Judicature at Patna, which affirmed a judgment and decree of the Subordinate Judge of Motihari, dated the 6th of March, 1923.

The plaintiffs are members of a joint family, and they carried on a money-lending business which was supervised by the first plaintiff who was *karta* of the family.

The defendant began to borrow money from the plaintiffs on the 20th of Pous 1310 Fasli (*i.e.*, January, 1903), when a sum of Rs. 300 was advanced and after the expiration of fifteen months eleven days interest was debited to the account. Further sums were advanced from time to time, and the accounts were adjusted periodically, the last adjustment having taken place on the 25th Jeth 1324, corresponding to May, 1917, so that the account between the parties was running for about fourteen years. Simple interest was charged upon each advance from the date of such advance until the date when the principal sum and interest were carried into a separate column of the account. The periods during which the interest was charged varied. The account was then adjusted and interest calculated on the total amount found due, so that compound interest was charged.

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Sir Lancelot Sanderson.

During the time the accounts were running they were submitted to the defendant and on nine occasions he signed the accounts, the first occasion being 10th Majh 1312 and the last occasion being 25th Jeth 1324 Fasli.

The accounts submitted by the plaintiffs to the defendant and signed by him as above mentioned showed the compound interest, the dates at which the adjustments respectively were made, the periods during which and the rate at which the compound interest was charged.

There is no dispute in this appeal as to the advances which were made or as to the simple interest charged thereon.

The only question argued before the High Court of Patna and before this Board was whether the plaintiffs are entitled to recover the compound interest charged in the accounts. Both the Courts in India decided this question against the plaintiffs, and the decree which the plaintiffs obtained was confined to the advances made and simple interest at the rate of 12 per cent. per annum from the date of the advance of each item in the accounts up to the date of the institution of the suit; a further direction as to interest at the rate of 6 per cent. until realisation was made.

The learned Judges of the High Court held that the plaintiffs' case as to compound interest was not made out; they stated that compound interest had undoubtedly been charged in the accounts, but not according to the case of the plaintiffs.

The learned Judges referred to the plaintiffs' case as disclosed in the plaint, and drew attention to the allegation therein that it was the practice of the plaintiffs' firm to charge interest with annual rests; they then pointed out that annual rests had not been made in the accounts, which no doubt is the fact.

They held that in order to succeed the plaintiffs were bound to establish that the defendant agreed to pay the interest with annual rests, and finding that such agreement was not proved they disallowed the compound interest and dismissed the appeal.

Mr. Justice Das, in his judgment, said as follows:—

"I quite agree that if the accounts which were signed by the defendant supported the case of the plaintiff I would have considerable difficulty in accepting the defendant's case But those accounts, in my opinion, do not support the specific case as made by the plaintiff"

The specific case there referred to is that there was an agreement that interest should be charged with annual rests, and the ground of decision is that as that specific case was not proved, the plaintiffs' claim to compound interest must fail.

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With respect to the learned Judges, their Lordships are of opinion that too narrow a view of the plaintiffs' case was adopted.

The plaint set out the facts in detail with regard to the submission of the accounts by the plaintiffs to the defendant, the dates on which they were submitted and the amounts claimed to be due to the plaintiffs at the various times when the accounts were presented; it was therein alleged that the defendant affixed his signature to the accounts when they were submitted to him, and reference was made to the last account which the defendant signed on the 25th Jeth 1324 Fasli and which showed an amount due of Rs. 1,02,706-6-3. The accounts thus referred to included the items of compound interest claimed by the plaintiffs.

It is true that it was alleged in paragraph 16 of the plaint that the plaintiffs' practice was to charge interest with annual rests, but there is also a specific allegation that the defendant was informed of the claim to interest and compound interest and he accepted the claim.

In view of these allegations in the plaint their Lordships are of opinion that the plaintiffs are entitled to rely on the course of dealing between the parties as showing an agreement by the defendant to pay the compound interest which was in fact charged by the plaintiffs in the accounts submitted to him.

Their Lordships have no doubt that in fact the defendant did so agree.

The course of dealing continued for about fourteen years: the accounts were periodically submitted to the defendant; when submitted he signed them, the accounts undoubtedly showed in detail the advances made, the interest charged, and the periods at which the rests were made, and no objection was made at any time during the abovementioned period. There was no doubt good consideration for the above-mentioned agreement, because, as the learned Subordinate Judge pointed out, if the defendant had objected to the compound interest being charged he would not have been able to obtain the further advances from the plaintiffs, which he desired, and which in fact he did obtain.

Their Lordships therefore are of opinion that the pleadings alleged an agreement by the defendant to pay the compound interest charged in the accounts which were submitted to and accepted by him, and that such agreement was proved.

The amount acknowledged by the defendant to be due in the account signed by him and dated the 25th Jeth 1324 Fasli was

Rs. 1,02,706-6-3. The transactions between the parties then ceased. Three items of compound interest for three periods after the 25th Jeth 1324 were included in the plaint making a total of Rs. 1,43,865-15-3. No agreement by the defendant to pay these items has been proved.

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Their Lordships therefore are of opinion that there should be a decree in favour of the plaintiffs for the said sum of Rs. 1,02,706-6-3 with interest thereon at the rate of 12 per cent. per annum from the 26th Jeth 1324 Fasli corresponding to 2nd June 1917 until the date of the institution of the suit: and that the total amount of the said sum and the said interest should carry interest at the rate of six per cent. per annum from the 6th March 1923 (the date of the Subordinate Judge's decree) until the date of realisation.

The appeal therefore should be allowed, the decrees of the learned Subordinate Judge and of the High Court at Patna should be set aside, and a decree should be made in favour of the plaintiffs in the abovementioned terms. The defendant should pay the plaintiffs the costs of this appeal and of the proceedings in both Courts in India, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H S. L. Polak.*

Solicitors for respondent: *Watkins & Hunter.*

K.J.R. *Appeal allowed.*

Note—It will be observed that their Lordships award interest at six per cent per annum from the date of the decree of the Trial Court and not as from the date of the institution of the suit, but it would seem that the omission to provide for payment of interest *pendente lite* is a clerical error: *cf* section 34, Civil Procedure Code, 1908—*K J R.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD SHAW, LORD ATKIN AND SIR LANCELOT SANDERSON.

Bhai Panna Singh and others .. *Appellants** (*Plffs.*)

v.

Firm Bhai Arjan Singh-Bhajan Singh-Surjan Singh and another .. *Respondents* (*Defts.*).

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Contract Act (IX of 1872), S 74—Sale of immoveable property—Contract for, fixing amount to be paid by either party as damages in case of

*P.C. Appeal No. 27 of 1928. 14th May, 1929.

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breach by him—Breach by purchaser and re-sale by vendor—Suit by vendor for damages in case of—Measure of damages—Right to recover amount fixed as penalty or liquidated damages—Right to recover only actual loss proved—Procedure—Case made by opponent—Witness called who is in a position to contract—Examination-in-chief of—Duty to obtain contradiction from witness in—Failure—Duty of opponent to raise question by cross-examination of witness—Omission to do so—Adverse inference from—Propriety.

A contract for the sale of immoveable property for the sum of Rs. 1,05,000 provided, *inter alia,* that the cost of stamp paper and registration was to be borne equally, that the purchasers were to pay Rs 500 earnest money, and that "the party retracting from the contract shall pay Rs. 10,000 as *pashemana* (damages) "

The purchasers having broken the contract, the vendors resold the property to another person for Rs 1,04,000, and instituted a suit against the purchasers, claiming the Rs 10,000 and further damages The only evidence of loss sustained by the plaintiffs was that of the loss on re-sale by Rs 1,000 They remained in possession of the rents and profits of the property until re-sale, amounting, according to the evidence, to Rs. 450 to 500 per mensem. They had received earnest money Rs 500. They had also received for the value of the stamp paper realised after deducting commission charged in respect of the purchaser's contribution, Rs 689-1-0

With regard to the amount of the damages to which the plaintiffs were entitled, *held,* that the effect of S. 74 of the Contract Act was to disentitle the plaintiffs to recover *simpliciter* the sum of Rs. 10,000, whether penalty or liquidated damages, and that their actual damage on the evidence being Rs 500 they were entitled only to that sum

The vendors having remained in possession of the rents and profits of the property until re-sale, there was no ground for awarding them interest The sum of Rs. 689 (the value of the stamp paper realised by the vendors after deducting commission charged in respect of the purchasers' contribution) the vendors held when the contract went off to the use of the purchasers, and the purchasers were in their cross-suit entitled to a decree for the said sum.

Where a party desires to contradict the case set up by his opponent and calls a witness who is in a position to contradict it, he is under a duty to obtain the contradiction from the witness in his examination-in-chief. If he fails to do so, the advocate for his opponent cannot be expected to raise the question by cross-examination of the witness, and no adverse inference can legitimately be drawn from that advocate's omission to do so

Consolidated appeals No. 27 of 1928 from one judgment and two decrees, dated the 25th October, 1926, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar (Mr H. Fraser), which reversed one judgment and two decrees, dated the 23rd December, 1925, of the Subordinate Judge, Peshawar.

The material facts of the case appear sufficiently from their Lordships' judgment.

The appellants were vendors and the respondents were vendees, and by an agreement, dated the 19th February, 1924, the former agreed to sell certain premises to the latter, but the sale

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was not carried out, one party blaming the other for breach of the agreement and claiming the sum of Rs. 10,000, which was specified in the agreement as the amount to be paid in case of breach.

The Subordinate Judge found that the agreement was broken by the vendees, but the learned Judicial Commissioner took the opposite view.

The above agreement, dated the 19th February, 1924, was signed by the vendors and the vendees and the brokers who negotiated the sale, and was in the following words:—

"We, Bhai Panna Singh, etc, have agreed to sell the *serai*, situate in Pipal Mandi, which we had purchased from Mian Safdar Ali and Mian Umar Baksh (to Arjan Singh-Bhajan Singh) for Rs 1,05,000 The cost of the stamp paper and registration, etc, will be paid by us (parties to the contract) half and half The purchasers shall pay Rs 500 as earnest money, for which the sellers will give a receipt. This *sitta* will be properly stamped and shown to the purchasers for their satisfaction The party retracting from the contract shall pay Rs 10,000 as *pashemana* (damages). The brokerage at the rate of Re. 1 per cent. will be paid by the sellers, and at the same rate by the purchasers"

The vendors received Rs. 500 as earnest money and gave a receipt in which they stated that the deed of sale shall be registered within a month, although no period of time was specified in the agreement of sale quoted above. The receipt in question, signed by the vendors and bearing the same date as the agreement of sale, was in the following terms:—

"We have received a cheque for Rs. 500 from you in lieu of earnest money respecting the sale of a *serai* together with a vacant site on its backside and all rights appertaining thereto, situate in Pipal Mandi, which we had purchased from Haji Safdar Ali Khan and Mian Umar Baksh Khan We have sold the same to you for Rs 1,05,000 The balance will be received before the Sub-Registrar and the deed got registered Both the parties shall abide by the terms laid down in the *sitta* The deed shall be registered within a month The party refusing to get the deed registered shall, according to the *sitta*, be liable to pay Rs. 10,000 as *harjana* (loss) We have executed this receipt so that it may serve as an authority

Note—Out of the balance, Mian Haji Safdar Ali Khan shall have to be paid the amount due to him and the remaining sum will be received before the Sub-Registrar and the deed will be registered"

On the question of damages, the Subordinate Judge awarded to the vendors the whole of the Rs. 10,000 named in the *sitta* and in the receipt as the amount to be paid by a party retracting from the contract or refusing to get the sale-deed registered In addition to the Rs 10,000, he awarded the vendors Rs. 1,000 for loss on re-sale.

On appeal by the vendees, the learned Judicial Commissioner dismissed the vendors' suit and decreed the vendees' suit. In assessing the damages in favour of the vendees, he noted that

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their Counsel on appeal, disregarding the stipulated amount of Rs. 10,000 named in the agreement, "does not hold out for more than reasonable damages on the principles contained in section 73 of the Indian Contract Act." He awarded the vendees the profit of Rs. 500 which they might actually have obtained at the time, *plus* return of earnest money, Rs. 500, and of stamp money paid, Rs. 787, in all Rs. 1,787.

Dunne, K.C. and *Dube* for appellants.

De Gruyther, K.C. and *Joseph Nissim* for respondents.

Joseph Nissim for the respondents raised the preliminary objection that the certificates of appeal in both suits were granted on an erroneous valuation and the appeals were without jurisdiction.

[*Lord Shaw.*—The objection may be raised at a later stage.]

Dunne, K.C. for appellants (vendors).—The vendors are entitled to the sum of Rs. 10,000 awarded by the Trial Court for damages, as mentioned in the sale agreement.

[*Sir Lancelot Sanderson.*—I think the Board have already decided that only compensation could be awarded.]

Nissim refers to *Vengideswara Putter* v. *Chatu Achen*[1] and *Mackintosh* v. *Crow.*[2]

[*Lord Atkin,* referring to Pollock and Mulla's Commentary on section 74 of the Indian Contract Act, observed that there were innumerable decisions on the construction of this section.]

[*Lord Shaw.*—The Court has full control as to the amount of compensation under section 74. You are entitled to reasonable compensation not exceeding the amount of the penalty.]

The section provides that quite apart from proof of damage, the Court can award compensation to the vendors. The sum of Rs. 10,000 mentioned in the agreement of sale is a liquidated sum.

[*Lord Atkin.—See* Pollock and Mulla's Contract Act, 2nd edition, page 322, beginning "This section boldly cuts the most troublesome knot in the Common Law doctrine of damages."]

[*Sir Lancelot Sanderson.*—The illustrations to the section throw some light on the question: *see* illustration (*g*).]

[*Lord Atkin* refers to illustration (*d*) to section 74.]

[*Lord Shaw.*—When you use the word "penalty," it is not necessarily confined to financial obligation.]

[*Lord Shaw.*—If we get to the facts of the case, the question under section 74 may not arise for decision at all.]

1. (1881) I.L.R. 3 M. 224. 2. (1883) I.L.R. 9 C. 689.

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[*Sir Lancelot Sanderson.*—Has the section ever been considered by the Board?]

Yes, in connection with questions of interest.

The period of one month mentioned in the receipt was not of the essence of the contract. The period of time was extended by the conduct of both parties. Four days to complete gave ample time. Reasonable compensation is a question of fact.

[*Lord Atkin.*—The measure of damages is a matter of law.]

Credit has to be given by the vendors for the earnest money in reduction of the damages to which they are entitled: *The President, Vellore Taluq Board* v. *Gopalasami Naidu.*[3]

De Gruyther, K.C. and *Joseph Nissim* for respondents (purchasers), on question of damages, refer to Mayne on Damages. The measure of damages is the same, whether it is a contract for sale of land or goods: *see* section 73, Indian Contract Act.

If there was any repudiation of the contract on the part of the purchasers, it was not accepted by the vendors, who kept the contract alive for both parties. Under section 55, para. 2 of the Contract Act, this contract was not voidable.

[*Lord Atkin* referred to section 39 and *Johnstone* v. *Milling*[4].]

Telegraphic notice to perform the contract in four days, sent on a Saturday, to the purchasers' pleader, did not give the parties reasonable time: *Mussa Mahomed* v. *Motilal Itchalal.*[5] Reasonable does not mean minimum but longest notice reasonably required for what remains to be done: *Crawford* v. *Toogood.*[6]

Dunne, K.C., in reply, being called on only on the question of the amount of damages, referred to the Contract Act, section 74, as enabling the Court, if so minded, to award substantially more than the actual damage.

14th May, 1929. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal from the Court of the Judicial Commissioner, North-West Frontier Province at Peshawar. The dispute arises out of an agreement for the sale of a

3. (1914) I.L.R. 38 M. 801 (F.B.)
4. (1886) 16 Q.B.D. 460.
5. (1921) 24 Bom L.R. 203.
6. (1880) 13 Ch.D. 153.

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serai in Peshawar. There were cross-suits, vendors and purchasers, each alleging that the others had broken the contract and claiming damages. The vendors succeeded before the Subordinate Judge, the purchasers before the Judicial Commissioner. The vendors appeal. In 1924 the vendors were the owners of the *serai* in question upon which there were mortgages amounting to Rs. 80,000 in favour of one of the former owners. They were being pressed by their creditors and found it desirable to sell the property. The sale was negotiated by brokers and the agreement was dated February 19, 1924. The agreement provided for the sale to the purchasers for Rs. 1,05,000. Cost of stamp paper and registration was to be borne equally. The purchasers were to pay Rs. 500 earnest money. "The party retracting from the contract shall pay Rs. 10,000 as *pashemana* (damages)." Vendors-purchasers were each to pay 1 per cent. brokerage. No time was fixed for completion, but on the same day the purchasers paid the earnest money and were given a receipt which provided that the balance should be received before the Sub-Registrar and the deed registered within a month. Each party found its half share of the stamp paper, the purchasers on the 18th March. According to the plaintiffs the purchasers delayed the preparation of the conveyance as they wished to see the Will of a deceased brother of one of the vendors in order to exclude the possibility of an outstanding claim by his widow. The plaintiffs alleged that on the 8th April the parties met to complete the conveyance. A writer, Ganga Bishan, was present and began the conveyance, but his work was broken off as the purchasers raised further points. They wanted on the conveyance the name of Ishar Singh, who was apparently their partner but who had not signed the agreement. They raised a question about boundaries, and they desired to see the outstanding mortgage. The plaintiffs alleged that they consented to all three points. The boundaries were forthwith investigated with Ishar Singh and the purchasers were provided with a copy of the mortgage. According to the plaintiffs they thereafter requested the defendants to complete but were put off. On the 26th April the conveyance was completed by Ganga Bishan in the presence of the purchasers and the brokers. The vendors were not present but it is significant that the boundaries inserted were in accordance with the alteration. On the same day there was a fight between a Sikh and a Mahomedan on the premises (which contained a mosque), which the plaintiffs suggest may have deterred the defendants from completion. On the 9th May

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the purchasers sent a written notice saying that the vendors had not got the sale-deed registered within a month, and claiming payment of Rs. 10,000 within a week. On the 10th May the vendors sent a telegram in reply stating that they had always been ready and willing to complete, that the delay was on the part of the purchasers, and specifically calling attention to the fact that at the request of the purchasers the name of Ishar Singh had been inserted in the sale-deed. The telegram concluded by saying that the vendors gave the purchasers four days to complete, and that in default they would sue for specific performance or damages. The purchasers made no reply, saying that it was ambiguously worded and they could not make out what it meant. On the 9th June the vendors agreed to sell to another purchaser at Rs. 1,04,000, and on the 1st October, 1924, they issued their plaint claiming the Rs. 10,000 and further damages. On the 11th October the purchasers filed their cross-suit, claiming Rs. 10,000 and the sum paid for earnest money and stamp paper.

The Subordinate Judge, before whom both suits were heard together, rightly concluded that the real issue was which party had broken the contract. He heard the witnesses on both sides, including the brokers and the writer, Ganga Bishan. In his judgment he finds in favour of the allegations of the vendors, and gave them judgment. The question in this respect is one of fact and their Lordships see no reason for not accepting the Subordinate Judge's findings. The plaintiffs were obviously willing sellers; there is some reason to suspect the defendants' financial ability at all times to complete the contract. The plaintiffs' evidence of the purchasers' grounds for requesting delay is corroborated in more than one particular and the writer, Ganga Bishan, when called by the purchasers, was not asked a single question to contradict the story already given by the vendors as to the transactions on the 8th April. Their Lordships cannot agree with the criticism made by the learned Judicial Commissioner on this point. Contradiction, if it could be made, was obviously to be given by the witness in examination-in-chief. In its absence the Advocate for the vendors could not be expected to raise the question by cross-examination. Their Lordships have carefully considered the judgment of the learned Judicial Commissioner, but do not find the doubts suggested by him sufficient to justify a reversal of the findings of the Court below. No further question seems to arise as to liability. It is plain from the findings that the purchasers postponed com-

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pletion from time to time for their convenience, and eventually broke the contract. The only question that remains is as to the amount of the damages.

The effect of the Indian Contract Act of 1872, S. 74, is to disentitle the plaintiffs to recover *simpliciter* the sum of Rs. 10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. The only evidence of loss is that of the loss on re-sale by Rs. 1,000. There seems to be no ground for displacing the trial Judge's finding that this was a genuine contract. The vendors remained in possession of the rents and profits of the property until re-sale, amounting, according to the evidence, to Rs. 450 to 500 per mensem. There is no ground for awarding them interest. On the other hand, they have received earnest money Rs. 500 so that their actual damage is Rs. 500. The vendors have also received for the value of the stamp paper realised after deducting commission charged in respect of the purchasers' contribution, Rs. 689-1-0. This sum, when the contract went off, they held to the use of the purchasers, and from the documents it is plain they have always admitted their liability for it, and been prepared to account for it against damages.

The decrees of the Judicial Commissioner should be set aside with costs, and the decree of the Subordinate Judge in the vendors' suit should be varied by substituting Rs. 500 for the sum awarded by him. In the purchasers' cross-suit the decree should be made in their favour for Rs. 689, but inasmuch as they failed in the main issue as to the breach of contract, without costs, there should be a set-off of the Rs. 500 and taxed costs against the Rs. 689. The appellants should have their costs of these appeals. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Langlois, Harding & Tate.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE REILLY.

Nune Panakalu .. *Petitioner** (*Complnt.*)

v.

Rao Saheb Ravula Subba Rao and others .. *Respondents.*

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Madras District Municipalities Act (V of 1920), *Ss* 52 (2), 54 (*a*) *and* (*b*), 56 *and* 57—*Chairman of Municipality—Whether a Municipal Officer—Prosecution of Chairman under Ss* 52 (2), 56 *and* 57—*Legality—Complaint under S* 54 (*a*) *and* (*b*)—*Sanction of Government, if necessary—Criminal Procedure Code, Ss.* 196 *and* 197 (1).

The Chairman of a Municipality is not a Municipal Officer within the meaning of S. 52 of the District Municipalities Act and therefore cannot be prosecuted for an offence under clause (2) of that section. Nor can he be prosecuted for offences under Ss 56 and 57 of the same Act, as these sections relate to offences by polling officers, clerks, or other persons in attendance at the polling room and the Municipal Chairman is not such a person.

Palaniappa Chettiar v *Krishnaswami Chettiar,* (1925) 48 M.L.J. 696 followed.

No sanction under S 197 (1) of the Criminal Procedure Code is necessary before instituting a complaint against the Chairman of a Municipality under S. 54 (*a*) and (*b*) of the District Municipalities Act where the alleged wrongful acts cannot be said to have been committed by the Chairman when acting or purporting to act in the discharge of his official duty

Quaere. Whether the sanction of the Government is necessary under S. 196 of the Criminal Procedure Code before instituting a complaint against the Chairman of a Municipality under S. 54 (*a*) and (*b*) of the District Municipalities Act?

Sesha Aiyar v *Venkatasubba Chetty,* (1923) 19 L.W 201 referred to.

Petitions under sections 435 and 436 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Guntur, dated 14th February, 1927 in Criminal Revision Case No. 42 of 1926 (C.C. No. 112 of 1926 on the file of the Court of the Joint Magistrate, Ongole) and the order of the Court of the Joint Magistrate of Ongole, dated 12th March, 1927 in C.C. No. 112 of 1926 and the order of the Joint Magistrate of Ongole, dated 5th November, 1926 in C.C. No. 112 of 1926.

A Krishnaswami Aiyar, M. Patanjali Sastri and *M. Venkatasubbiah* for petitioner.

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*Cr. Rev Cases Nos. 281 to 283 of 1927 1st December, 1927.
Cr R Ps Nos. 249 to 251 of 1927.

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The Public Prosecutor on behalf of the Crown.

V. Ramadoss, Kameswara Rao, G. Lakshmanna and *A. Ramaswami Aiyangar* for respondents.

The Court made the following

Madhavan Nair, J.

ORDER. *Madhavan Nair, J.*—The petitioner in these cases, a defeated candidate at an election in the Chirala Municipality, filed a complaint before the Joint Magistrate of Ongole against the 1st accused the successful candidate, the 2nd accused the Municipal Chairman, and the 3rd accused the Polling Officer, under Ss. 52 (2), 54 (*a*), 54 (*b*), 56 and 57 of the District Municipalities Act. Generally stated, the charge against them was that they all conspired together and procured improper entries in the voters' list, threatened voters with prosecutions for alleged encroachments, etc., detained some of them under wrongful restraint and infringed rules for preserving secrecy of the election—these things having been done for the purpose of supporting the candidature of the 1st accused. The Joint Magistrate took the complaint on file against the 1st and the 3rd accused and passed an order that sanction of the Government appeared to be necessary for the prosecution of the 2nd accused. The complainant thereupon filed a fresh petition before the Joint Magistrate requesting him "to include the 2nd accused, issue summons to him and take fresh evidence." The Joint Magistrate issued summons, and, after hearing the pleaders on both sides regarding the necessity for Government sanction, passed an order under section 203 of the Code of Criminal Procedure, dismissing the case against the 2nd accused. In doing so he held that no case was made out against the 2nd accused under sections 56 and 57 of the District Municipalities Act as he was not a Municipal Officer and that, as regards the offences under sections 52 and 54, sanction of the Local Government was necessary before proceeding against him. The District Magistrate was called upon to revise this order (Cr.R.P. No. 42 of 1926) and he then held that the Joint Magistrate's order under section 203, Criminal Procedure Code, must be construed as an order of acquittal. He also held that, even if it did not amount to an order of acquittal, the proceedings could not go on against the 2nd accused without the sanction of the Local Government and that he was not prepared to move the Government to appeal against the acquittal on his own motion "as the complaint was too nebulous to warrant a presumption that a good case could ever be made out." He therefore dismissed the petition.

Criminal Revision Cases Nos. 281 and 283 have been filed by the complainant against the above orders of the District Magistrate and the Joint Magistrate respectively. After disposing of the case against the 2nd accused, the Joint Magistrate took up the case against the 1st and the 3rd accused and, as he was of opinion that the complainant absented himself to prevent the Court from proceeding with the trial of the case on an adjourned date, he acquitted the two accused under section 247 of the Criminal Procedure Code. This order is sought to be revised in Criminal Revision Case No. 282 of 1927.

Cr. Rev Cases Nos 281 *and* 283 *of* 1927.—I will first deal with Criminal Revision Cases Nos. 281 and 283 of 1927 in which the 2nd accused is the counter-petitioner. Mr. Ramadoss for the 2nd accused has not argued that the order of the Joint Magistrate amounts to an order of acquittal. Though the Joint Magistrate issued summons to the 2nd accused there was no order either under section 202 or under section 204 of the Criminal Procedure Code. The records show that no evidence was recorded on either side. The District Magistrate's opinion that evidence must have been tendered is a pure conjecture. In these circumstances, I do not think that the order of the Joint Magistrate dismissing the complaint amounts to an order of acquittal. It is, as it distinctly purports to be, an order under section 203 of the Criminal Procedure Code dismissing the complaint and nothing more.

The real question for consideration is whether sanction of the Local Government is required for prosecuting the 2nd accused for any of the offences mentioned in the complaint. As Ss. 56 and 57 of the District Municipalities Act relate to offences by polling officers, clerks or other persons in attendance at the polling room, clearly the 2nd accused cannot be prosecuted for those offences as he is the Municipal Chairman and admittedly not a polling officer, clerk or other person in attendance at the polling room and so no question of sanction arises with reference to these sections. The same is the case with regard to the complaint under section 52 (2) brought against him. Under that section

"Every Municipal Officer or servant or polling officer who wilfully makes or procures any improper entry in the electoral roll or any improper omission therefrom shall be punished . . . ."

It is argued that a Municipal Chairman is not a Municipal Officer and so he cannot be proceeded against for an offence under this section. In support of this argument reliance is

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placed on the wording of sections 18 (3), 70, 73, 75, 76, 352 and 355 (1) of the District Municipalities Act and also on the decision in *Palaniappa Chettiar* v. *Krishnaswami Chettiar*.[1] In the Act a distinction is made between a Municipal Chairman and a Municipal Officer, though with respect to some of the sections it has been argued that the "Chairman" has to be referred to as such in describing his individual powers and duties, and the powers, in certain circumstances, which he possesses over Municipal Officers. To illustrate what I have said, section 18 says that the executive powers of the Chairman may be delegated to any Councillor, Municipal Officer or servant, etc. Section 70 (1) says that the Chairman shall from time to time lay before the Council a schedule setting forth the designations and grades of the officers and servants. Section 75 says that, subject to certain provisions, the Chairman may fine, reduce, suspend, remove or dismiss any Municipal Officer or servant. Section 76 says that the Chairman may grant leave to all Municipal Officers and servants. Though the use of the term "Chairman" as an individual different from a Municipal Officer in these sections may perhaps be thus explained, it seems to me that the Chairman of the Municipality is not classed along with the Municipal Officers, but is treated, for the purposes of the Act, as different from a Municipal Officer. This appears to be clear from sections 352 and 355 (1). Section 352 says that "no suit shall be maintainable against any Municipal Chairman, officer or servant, or any person acting under the direction of any Municipal Chairman, officer or servant, or of a Magistrate, etc." Section 355 (1) states that it shall be the duty of every police officer to assist the Chairman or any Municipal Officer or servant reasonably demanding his aid for the lawful exercise of any power vesting in the Chairman or in such Municipal Officer or servant under this Act, etc. The explanation that was plausibly attempted for distinguishing the Municipal Chairman from a Municipal Officer in the sections I have referred to does not evidently apply to these sections which show that the Municipal Chairman is put in a different class as distinguished from a Municipal Officer or servant of the Municipality. In *Palaniappa Chettiar* v. *Krishnaswami Chettiar*,[1] to which one of us was a party, it was held that the Vice-Chairman is not an officer of the Municipality within the meaning of section 49 incompetent to stand for an election. I

1 (1925) 48 M.L J. 696

see no reason why we should not follow this decision and hold that the Chairman is not an Officer of the Municipality within the meaning of section 52 also. So far as possible, the terms appearing in the different sections of the Act should be interpreted in the same way. The main argument urged in support of the contention that the Municipal Chairman is a Municipal Officer within the meaning of section 52 is based upon the fact that it is the duty of the Chairman under section 44 (1) of the Act to prepare and publish an electoral roll showing the names of the persons qualified to vote. If that is so, it is argued that the Act should not have contemplated to exclude from the scope of section 52 (2) dealing with improper entries in electoral rolls or improper omissions therefrom, the Municipal Chairman whose duty it is to prepare and publish the electoral roll. I cannot accept this argument. In view of the rules for the preparation of electoral rolls in Municipalities published under the Act, in cases where objections are taken against the preliminary roll the Municipal Chairman must be considered as sharing the responsibility for the accuracy of its contents with the "revising authority"; and further Rule 8 (*g*) says that

> "None of the officers entrusted with the preparation of the rolls shall be held legally liable for their completeness or accuracy; neither shall they be held liable to any action for damages by reason only of any omission or inaccuracy in respect of such rolls or any non-compliance with the dates prescribed in these rules"

It would thus appear that the reason suggested for bringing Municipal Chairman within the scope of section 52 (2) has not much force. As I have held, on an examination of the relevant sections of the District Municipalities Act, that a distinction is made in the Act between a Municipal Chairman and a Municipal Officer, the 2nd accused cannot be prosecuted under S. 52 (2) of the Act.

The next question is whether under section 197 (1) of the Code of Criminal Procedure the previous sanction of the Local Government is required before instituting a complaint against the Chairman of a Municipality under section 54 (*a*) and (*b*) of the District Municipalities Act. In this case the 2nd accused is alleged to have threatened some voters that he would increase their property tax and others that he would institute prosecutions against them for alleged encroachment if they did not vote for his candidate. He is said also to have wrongfully restrained some people from voting. I am clearly of opinion that no sanction is required before proceeding against the Municipal Chairman with respect to these alleged offences. No

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doubt, the Chairman of a Municipality is a public servant and not removable except by the Local Government (see *In re Chairman of the Municipal Council, Ellore*[2] and *King-Emperor* v. *U Maung Gale*[3]). But the acts alleged against him cannot be said to have been committed by him while acting in the discharge of his official duty. It is conceded that the alleged act of wrongful restraint cannot be said to have been committed by the Chairman in his capacity of public servant as such. In my opinion, the allegations made against him under section 54 (*b*) also fall within the same description. In *Kamisetty Raja Rao* v. *Ramaswami*[4] it was held that no previous sanction of the Local Government was necessary for instituting a complaint against the Chairman of a Municipality for threatening a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting. I therefore hold that sanction under section 197 (1), Criminal Procedure Code, is not necessary in respect of the complaint against the 2nd accused under S. 54 (*a*) and (*b*) of the District Municipalities Act.

Mr. Ramadoss then argues that, as the complaint alleges that all the accused conspired together to commit the aforesaid offences, sanction under section 196-A of the Criminal Procedure Code is required for proceeding against the 2nd accused and also against the other accused. I cannot accept this argument, for the complaint does not disclose a charge of criminal conspiracy punishable under section 120 (*b*) of the Indian Penal Code against the accused. It is not alleged in the complaint that any of the accused committed that offence; nor do the allegations in it make out that such an offence has been committed. The words "conspire" and "conspiracy" are vaguely used in the complaint only to show that all the accused are jointly responsible for the commission of the offence. Sanction under section 196-A, Criminal Procedure Code, is therefore not necessary for proceeding against any of the accused in this case.

The last argument advanced on behalf of the 2nd accused is that, since the offences alleged against him under section 54 (*a*) and (*b*) of the District Municipalities Act fall within Chap. IX of the Indian Penal Code, *viz.*, section 171-C, sub-section (2), clause (*a*), he is immune from prosecution for those offences except under the authority of Government as

2. (1894) 1 Weir 243.
3 (1926) I.L.R. 4 Rang 128 at 130
4. (1927) I.L.R. 50 M. 754. 52 M.L.J. 647.

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time when this notice was sent to him; and if he was not there, it is clear that he could not have known that the case had been posted for the 12th of March, 1927. It cannot therefore be said that he had information that the hearing of the case stood adjourned to the 12th of March. In these circumstances, I cannot say that the complainant was absent on the date to which the hearing of the case stood adjourned within the meaning of section 247 of the Criminal Procedure Code. The order, therefore, does not amount to an order of acquittal. It is clearly an order of dismissal and can be revised by this Court.

As regards the 1st accused, it is clear that section 52 (2) of the District Municipalities Act does not apply to him. It is argued that, as in the case of the 2nd accused proceedings cannot be taken against this accused also, as he is punishable under S. 171-C of the Indian Penal Code, and that, therefore, sanction is necessary under section 196-A of the Code of Criminal Procedure. On this question the opinion that I have already expressed with reference to the case of the 2nd accused applies to this case also. From what has been said it is clear that sanction under section 196-A also is not necessary, and it is not suggested that sanction is required under section 197 of the Criminal Procedure Code before proceeding against this accused.

The substantial offences alleged against the 3rd accused are those which come under sections 56 and 57 of the District Municipalities Act. It is conceded that no sanction under section 197 of the Criminal Procedure Code is required for prosecuting him for such offences. Sanction under section 196 or 196-A also is not required for proceeding against him as the offences he is charged with are not punishable under Chap. IX-A of the Indian Penal Code and as I have already held that the complaint does not make out a case of criminal conspiracy under section 120-B of the Indian Penal Code.

In view of the facts which I have already adverted to, namely, that the complaint is vague and indefinite and the allegations are of a very unsubstantial character, I think that in the case of these accused also no further proceedings need be taken.

. . . . In the result, all the revision cases are dismissed.

Reilly, J.

Reilly, J.—The petitioner's complaint, so far as it is against accused 2, the Chairman of the Chirala Municipal Council, was dismissed by the Sub-divisional Magistrate of Ongole, and the District Magistrate of Guntur refused to interfere with that order in revision. Accused 1 and 3 were afterwards acquitted by the

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Sub-divisional Magistrate, who professed to act under S. 247, Code of Criminal Procedure.

It is convenient to deal first with all allegations in the complaint against accused 2. The petitioner first complains that accused 2 got some of his "underlings" entered on the electoral roll who had no right to a vote and so committed an offence punishable under section 52 (2) of the Madras District Municipalities Act. But under that sub-section the only persons who can be punished are Municipal Officers or servants or polling officers. It is contended for accused 2 that he is not a Municipal Officer or servant within the meaning of that provision, and it is not suggested that he was a polling officer. The contention that accused 2, who holds the most important Municipal office in the town, is not Municipal Officer within the meaning of this sub-section is at first sight surprising But, when we examine the Act, it appears that the expression "Municipal Officer," as used in it, does not include the Chairman of a Municipal Council. This is clear from Ss. 18 (3), 49 (2) (*iv*), 70, 73, 75, 76, 352 and 355 (1) (*b*). It is suggested for the petitioner that in section 358, which provides that Municipal Officers, servants, contractors, agents and others shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code, the Chairman must be included in the term "Municipal Officer" as otherwise he will not hold the position given to his subordinates by this section But that argument is fallacious as section 21, Indian Penal Code, itself clearly includes the Chairman of a Municipal Council within the definition of a "public servant." Then it is argued for the petitioner that, whatever "Municipal Officer" may mean in other parts of the District Municipalities Act, in section 52 (2) it must include the Chairman of the Municipal Council because he is the person chiefly responsible for the electoral roll and in the best position for committing the offences made punishable by that sub-section, from which it would be anomalous that he should be exempt But, when we read the rules made under the Act, as we are bound to do, with the Act, of which they have been made part, we find that the most important part of the Chairman's duties in connection with the electoral roll is performed as President of a *quasi*-judicial tribunal, which may explain why he should be exempted from the scope of section 52 (2) and that provision be confined to those who are likely to have the custody of the roll or to use it after its preparation. However, I do not think it is necessary to make any elaborate search for reasons which may have led to the Chair-

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man's exemption from section 52 (2). If in the rest of the Act the term "Municipal Officer" is used in a sense excluding the Chairman, only an overwhelming reason would justify us interpreting the term so as to include the Chairman in this sub-section. I agree that the Chairman does not come within the scope of section 52 (2) and, therefore, accused 2 cannot be prosecuted for an offence punishable under that sub-section.

The complainant next charges accused 2 with offences punishable under S. 54 (*a*) and S. 54 (*b*) of the District Municipalities Act on the ground that he threatened voters with prosecutions for alleged encroachments or nuisances or with improper raising or levy of profession or property tax in order to induce them to vote for accused 1 or to abstain from voting for the petitioner at the election in question and that he committed wrongful restraint of some voters. It has been contended for accused 2 that he cannot be prosecuted for the alleged offence or offences punishable under section 54 (*a*) of the Act in the absence of the sanction required by section 197, Code of Criminal Procedure, on the ground that he is a public servant to whom that provision applies. But it is clear that section 197, Code of Criminal Procedure, is not applicable, the petitioner's allegation in his complaint being not that accused 2 did anything when acting or purporting to act in the discharge of his official duty but that at a time when he was not so acting or purporting to act he threatened that at some future date he would use his official powers to the detriment of the voters concerned. Next it has been contended that accused 2 cannot be prosecuted for either of the alleged offences punishable under section 54 (*a*) and section 54 (*b*) of the District Municipalities Act because both those offences are now punishable under Chap. IX-A of the Indian Penal Code, and under section 196, Code of Criminal Procedure, no Court can take cognizance of any offence punishable under Chap. IX-A without the prescribed sanction, which has not been obtained A good deal might perhaps be said in favour of this contention, and it would require serious consideration but for the fact that it has been decided by a Bench of this Court in *Sesha Aiyar* v. *Venkatasubba Chetty*[5] that cognizance can be taken under the District Municipalities Act of an offence made punishable under that Act, even though it is punishable also under Chap. IX-A, Indian Penal Code, without the sanction required by section 196, Code of Criminal Procedure. In my opinion

5 (1923) 19 L.W. 201.

we must follow that decision. The Magistrate was, therefore, at liberty to take cognizance of the allegation against accused 2 of offences punishable under section 54 (*a*) and section 54 (*b*) of the District Municipalities Act without the sanction required by either section 196 or 197, Code of Criminal Procedure.

Accused 1, the petitioner's opponent at the election, was charged in the petitioner's complaint with committing in concert with accused 2 the alleged offences punishable under sections 52 (2), 54 (*a*) and 54 (*b*) of the District Municipalities Act. Section 52 (2) obviously does not apply to accused 1; but like accused 2 no sanction under either section 196 or section 197, Code of Criminal Procedure, was required for prosecuting accused 1 for the other two offences.

Against accused 3 the petitioner's complaint alleged that he as polling officer committed offences punishable under sections 56 and 57 of the District Municipalities Act. Those offences are not punishable under Chap. IX-A, Indian Penal Code, and it is not suggested that for accused 3's prosecution any sanction was required under section 196 or section 197, Code of Criminal Procedure.

But another contention has been raised for all the accused that the petitioner's complaint really charges them with criminal conspiracy punishable under section 120-B, Indian Penal Code, and for that offence they can be prosecuted only with the sanction required by section 196-A, Code of Criminal Procedure, which has not been obtained. It is true that in the complaint it is alleged that accused 1 and 2 conspired together in respect of the offences with which they are charged and that accused 3 committed the offence punishable under section 57 of the District Municipalities Act in conspiracy with the other accused; and in a supplemental petition presented by the petitioner on 24th October, 1926, he stated that

"the main allegation in the complaint is that all the three accused conspired together and committed all the offences jointly and in the same transaction in promotion of the object of the criminal conspiracy in which all of them are partners"

But it cannot be seriously suggested, when more persons than one are charged by a complainant with the commission of an offence, that merely because the allegation involves incidentally an implicit or explicit charge of criminal conspiracy the offenders cannot be tried for the alleged offence unless the sanction required by section 196-A, Code of Criminal Procedure, for their prosecution for criminal conspiracy is obtained. If

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that were so, no offenders, for instance, could ever be tried for dacoity without previous sanction for their prosecution for criminal conspiracy. That is clearly not the effect of section 196-A, Code of Criminal Procedure, and it is surprising that this contention should have been raised.

The result of the discussion is that there is no technical reason why the Sub-divisional Magistrate should not have proceeded with the charges against the accused other than those for offences punishable under section 52 (2) of the District Municipalities Act as it is not disputed that the petitioner complied formally with the requirements of section 59 of that Act. The acquittal of accused 1 and 3 under colour of section 247, Code of Criminal Procedure, appears to me to have been improper, as it is not shown satisfactorily that the petitioner was aware that the case, which had been adjourned *sine die* had been re-posted to 12th March, 1927, when he failed to appear. But it has still to be decided whether it is necessary or proper for us to set aside the Sub-divisional Magistrate's orders in the case and to direct him to proceed with it. There appears to me to be a good reason why we should not do so. The petitioner's complaint is an extraordinary one. I do not think that I have ever seen so vague a complaint. In regard to none of the offences except that of wrongful restraint is a single definite fact alleged. It is alleged that some of accused 2's "underlings" were wrongly entered in the electoral roll and that some voters were threatened, but who they were or when these things were done there is nothing to show. It is alleged against accused 3 that he announced the names of some voters as having voted for accused 1, informed accused 2 which voters had supported accused 1, allowed some persons to vote who were not entitled to do so and prevented others who were entitled to do so from voting; but here again not a single voter's name is mentioned. In regard to wrongful restraint it is alleged that "Rattayya and Raghavalu and some others were detained in the houses of the 1st and 3rd accused under wrongful restraint." That is the nearest approach to any definite allegation in the complaint; but even there it is not mentioned who were detained in which house. And it does not appear that Rattayya or Raghavalu or any one else himself complained of any such detention. The provisions of section 59 are obviously introduced into the Act partly with the object of preventing stories of election offences being invented and worked up at leisure by disappointed candidates or their partisans. If vague complaints such as this one

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are accepted and the complainants allowed to fill in the details afterwards, that object will be defeated. In my opinion the only proper way for the Sub-divisional Magistrate to deal with the complaint would have been to dismiss it at once, and we should certainly not be justified in allowing the case to be re-opened now. I agree that all these revision petitions should be dismissed.

N.S. *Petitions dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

T. Mohamed Yusuf and others .. *Appellants** (*Plffs.*)

v.

Khan Bahadur Muhammad Sadulla Badsha Sahib and others .. *Respondents* (*Defts.*).

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Civil Procedure Code (*V of* 1908), *O* 21, *R* 50 (2); *O* 30, *R* 4—*Partnership—Decree against, in its firm name—Execution of—Partner who had died before institution of suit—Legal representatives of—Execution of decree against—Permissibility.*

A decree for money was passed against a partnership in its firm name. B was a partner in that firm, but he had died before the suit was instituted. At the time of filing his suit the plaintiff knew that B was dead but he did not know that B was a partner. On an application made by the plaintiff under O 21, R 50 (2), Civil Procedure Code, for leave to execute the decree against the legal personal representatives of B, that is, against the assets of B in the hands of his legal personal representatives, *held, by the Full Bench,* that execution could not issue against B's legal personal representatives

Sub-rule (2) of O. 21, R 50 of Civil Procedure Code would apply only when the decree is sought to be executed against any person as being a partner in the firm.

O. 30, R. 4 of Civil Procedure Code only gives the legal representatives a right to apply to be made a party to suits in the name of firms It has been enacted in the Code evidently, to obviate difficulties that might otherwise be suggested, having regard to the provisions of S. 45 of the Contract Act But it does not enable a decree-holder to claim the right claimed in the present case

Under the rules of the Supreme Court, in execution of a decree obtained against a firm as such, the separate property of a partner who was dead at the date of the issue of the writ cannot be proceeded against in execution; and that is the law which is sought to be reproduced in the provisions of the present Civil Procedure Code

On appeal from the order of the Hon'ble Mr. Justice Waller, dated 7th day of October, 1927, and passed in the exercise of

*O.S. Appeal No. 92 of 1927. 12th March, 1929.

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the Ordinary Original Civil Jurisdiction of this Court in C.S. No. 63 of 1926.

P. Visvanatha Aiyar for appellants.

G. Krishnaswami Aiyar for *T. R. Srinivasa Aiyar* for respondents.

The Court (The Chief Justice and Odgers, J.) made the following

Coutts Trotter, C. J.

ORDER OF REFERENCE TO A FULL BENCH. *The Chief Justice.*—This case raises a point of some difficulty which in my opinion ought to be referred to a Full Bench. The facts are not in dispute. The suit was brought against a firm of Haji Sheik Mira Sahib & Co., in the firm name. The plaintiff in that suit was given a decree against the firm for Rs. 6,453. It is conceded that Haji Badrudeen Sahib, now deceased, was at one time a partner in the defendant firm. The application under review was an application to issue execution against his assets in the hands of his legal representatives and the learned Judge granted leave. It is argued before us that, having regard to the way in which the suit was framed, this cannot be done and that execution must be confined to the partnership assets, if any, which can be traced to the hands of the deceased partner's legal representatives and cannot be extended to his estate generally. The difficulty appears to me to arise by reason of the provisions of Order 21, rule 50 as contrasted with Order 30, rules 3 and 4. Order 21 is the part of the Code which specifically deals with execution and rule 50 deals with the question of executing decrees against a firm where the decree is granted against the firm in its firm name. This is on the face of it the operative rule and it is fairly clear that sub-rule (*b*) of that rule, which is the only one that can possibly be suggested as applicable to the present case does not so apply, for it confines execution to a person who has appeared or who has admitted upon the pleadings that he is, or has been adjudged to be, a partner. The question is to what extent Order 30, which is a new order corresponding in the main to Order 48-A of the rules of the Supreme Court of England, can be held by necessary implication to have extended this liability. The facts here are that at the time he got his decree the plaintiff knew that Badrudeen Sahib was dead but he did not know that he had in fact been a partner. That appears to exclude the operation of the proviso to Order 30, rule 3, which deals with the case of a partnership, which had been dissolved to the knowledge of the

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plaintiff before the institution of the suit. I do not myself see how it can be said that the plaintiff had knowledge of dissolution merely because he knew that a particular individual was dead though at the time he instituted the suit he did not know that he was a partner. But the real difficulty is created by Order 30, rule 4, which enacts that where two or more persons may sue or be sued in the name of a firm and any such person dies, whether before the institution or during the pendency of the suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. The question that is to be determined is whether this amplifies the scope of Order 21, rule 50 and makes the legal representatives liable in execution in a case like the present. It is contended that Order 30, rule 4 (1) only means that is not necessary to join the legal representatives of the deceased in order to issue execution against them. It is argued on the other side that the purpose of that sub-rule is merely to preclude the possibility of the suit being said to be bad for non-joinder of such legal representatives and that, unless it means that and no more, it is impossible to reconcile it with the proviso to rule 3. The whole subject has been elaborately discussed in *Mathuradas Canji Matani* v. *Ebrahim Fazulbhoy*,[1] where all the authorities, both Indian and English, are reviewed. I do not think myself that the English authorities are of much help because there is nothing in the provisions of Order 48-A, Rule 3 corresponding to our Order 30, Rule 4. I would formulate the question thus:

> "Where a decree is passed against a partnership in its firm name and the plaintiff at the time of filing his suit knew that a person who was afterwards discovered to be a partner was dead, but did not know that he was a partner, can execution be issued against the legal personal representatives of such deceased person?"

The question is one that is likely to recur and I think there ought to be an authoritative ruling for the guidance of the Courts of this Presidency.

Odgers, J.

Odgers, J.—Speaking for myself, I should have been content to rest our decision on *Mathuradas Canji Matani* v. *Ebrahim Fazulbhoy*,[1] which seems to me to be correct and relevant to this case.

There is however as my Lord has pointed out the difficulty with regard to rule 4 of Order 30 and I have no desire to oppose the reference of this important point to a Full Bench and accordingly concur in the order of reference proposed.

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1. (1927) I.L.R. 51 B. 986

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P. Visvanatha Aiyar for appellants.

G. Krishnaswami Aiyar and *T. R. Srinivasa Aiyar* for respondents.

The Court (Anantakrishna Aiyar, J.) expressed the following

OPINION.—The question that has been referred for the opinion of the Full Bench is

"Where a decree is passed against the partnership in its firm name and the plaintiff at the time of filing his suit knew that a person who was afterwards discovered to be a partner was dead, but did not know that he was a partner, can execution be issued against the legal personal representatives of such deceased person"

in respect of assets in their possession belonging to the deceased partner?

Before the enactment of Act V of 1908, the procedure that was generally adopted in Indian Courts in respect of suits against firms was to have the names of the members of the firm set out in the plaint and to have them or one of them personally served with a summons. In the case reported in *Yeknath Babaji* v. *Gulabchand Kahanji*[2] Forbes, Westropp and Tucker, JJ., held that

"the suit being instituted against the firm, the names of the members of the firm should have been mentioned in the plaint, and that they, or one of them, should have been personally served with a summons if within the jurisdiction."

Sir Barnes Peacock, Chief Justice, and Hobhouse, J., in the case reported in *Koylash Chunder Roy* v. *Edward Ellis*[3] observed as follows:

"In the case of an unincorporated or unregistered company, the proper course would be to sue the individual members of the company in the same way as the individual members of any other firm, not being incorporated or registered, would have to be sued But it appears that the plaintiff does not know of what persons the company is composed. If that is so, we are of opinion that he might sue the company by the name of 'the Bengal Indigo Company', the name under which they are carrying on their business, and contracted with him, if at all. But he will have to state in his plaint that he is unable to give any better description of the defendants than that. The suit will then proceed against that company, and any property belonging to the firm will be liable to be taken in execution if a decree be obtained"

In Macpherson's "Procedure of the Civil Courts of the East India Company," published in 1850, it is stated that

"if there be a demand against a partnership, all the partners must be before the Court and if any of the partners liable to the demand are dead, their representatives ought to be parties"

Under section 74 of Act XIV of 1882,

"if the defendants are partners and the suit relates to a partnership transaction or to an actionable wrong in respect of which relief is claim-

2. (1863) 1 Bom H.C.R. (A C J.) 85 3 (1867) 8 W R (Civ Rul) 45.

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able from the firm, the service may be made, unless the Court directs otherwise, either, (*a*) on one defendant for himself and for the other defendants, or (*b*) on any person having the management of the business of the partnership at the principal place of such business ''

Subject to that exception, the section states that

''when there are more defendants than one, service of the summons shall be made on each defendant.''

Order 5, Rule 11 of the present Civil Procedure Code (V of 1908) enacts that

''Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant ''

Thus according to the procedure followed by the Indian Courts, in a suit against an unincorporated company the names of all the individual members must be given in the plaint. The practice of English Courts was different, and there such a partnership or firm may sue or be sued by its usual designation. When the new Civil Procedure Code was passed, opportunity was taken to permit of a similar procedure being followed in cases of suits by and against firms and Order 30 was inserted which proceeded on the lines of Order 48-A of the rules of the Supreme Court.

Thus an alternative procedure was prescribed, of which parties could in their option take advantage. In suits against firms, if the plaintiff be so minded, he could sue any two or more persons claiming or being liable as partners and carrying on business in British India in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. The plaintiff in such cases is not bound to disclose the names of partners in the plaint. As regards service of summons in such cases, Order 30, rule 3 prescribes the procedure, that it may be served (*a*) upon any one or more of the partners, or (*b*) at the principal place at which the partnership business is carried on within British India upon any person having at the time of service the control or management of the partnership business there, as the Court may direct, and such services shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India. There is a proviso to rule 3 which enacts that in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit the summons shall be served upon every person within British India whom it is sought to make liable. Further when the suit is filed as aforesaid against a firm if any of the persons sued in the name of a firm should happen to die whether before the institution or

during the pendency of any suit it shall not be necessary to join the legal representatives of the deceased as a party to the suit.

The procedure in case of suits against firms has been thus simplified, following the English practice.

When the question is how such decrees against firms can be executed, the Code lays down the general rule in Order 21, rule 50, viz., that such decrees can be executed against any property of the partnership; but that a decree against a firm shall not release, render liable, or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

These being the general principles laid down by the Code regulating the procedure to be followed in suits against firms and the mode of executing such decrees, we may refer to the special facts found in the particular case in which reference to the Full Bench has been made A decree for money was passed against the firm of Haji Sheik Mira Sahib and Company for Rs. 6,453. It was conceded that Haji Badrudeen Sahib was a partner in the defendant's firm, but he was dead before the suit was instituted. The plaintiff-decree-holder applied under Order 21, rule 50, sub-clause (2) for leave to execute the decree against the legal representatives of the deceased Badrudeen Sahib. The question is whether the decree-holder is entitled to have such leave

It is contended that the decree-holder is entitled to cause the decree to be executed not only against persons referred to in sub-rule (1), clauses (*b*) and (*c*) of Order 21, rule 50, but that he is also entitled to have the decree executed against any other person as being a partner in the firm; and it was argued that the circumstance that the person who was a partner in the firm was dead at the time of the application could be no bar to the decree-holder being granted leave for execution as claimed, and that the only question which the legal representatives could raise would be whether the deceased was a partner in the firm or not. On the other hand it was urged on behalf of the legal representatives that the Civil Procedure Code has only followed the procedure prescribed by the rules of the Supreme Court, and that under the English rules, where a partner dies before action and a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution.

Having considered the provisions of Order 21, rule 50 and Order 30, rules 1 to 5, and also the corresponding provisions

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of Order 48-A of the rules of the Supreme Court, we are of opinion that the decree-holder is not entitled to claim leave to execute the decree against the personal properties of the deceased partner in the hands of his legal representatives. When the partnership is a going concern and the partners are sued in the name of the firm the summons is to be served as laid down in the first portion of Order 30, rule 3; but in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit the summons shall be served upon every person within British India whom it is sought to make liable. Order 30, rule 3 of the Civil Procedure Code is thus relevant only when the question of the *service* of a summons is concerned, and questions relating to *execution* of decree against firms have to be decided with reference to Order 21, rule 50. It is admitted that neither clause (*b*) nor clause (*c*) of rule 50, sub-rule (1) applies to the present case. In our opinion, neither can sub-rule (2) of rule 50 apply to the present case. According to the wording of the sub-rule (2), it would apply only when the decree is sought to be executed against any person as being a partner in the firm. Here it is not contended that the legal representatives against whom the decree is sought to be executed were ever partners in the firm; so that unless the person against whom leave to execute the decree is asked is alleged to be a partner in the firm, sub-rule (2) cannot be invoked by the decree-holder. As observed by Benson and Sundara Aiyar, JJ., in *Sahib Thambi* v. *Hamid*[4]:

"The general rule of law is that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed can bind those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. The principle is recognized in England in partnership suits in Order 48-A, Rule 8, Judicature Act which lays down that where a judgment or order is against a firm, execution may issue only against any property of the partnership so far as partners who are not individually served and those who have not appeared are concerned"

In England it has been held that if one of several partners dies before action is brought and the plaintiff seeks, in suing, the firm, to make the deceased partner's private estate liable, he must add as defendant the personal representative of such deceased partner. (*See* the Annual Practice, 1928, pages 840 and 841). In *Ellis* v. *Wadeson*,[5] Romer, Lord Justice, delivering the judgment of the Court of Appeal observed at page 718:

"Now consider the question of death Suppose a partner dies before action brought, and an action is brought against the firm in the firm's

4 (1911) I.L.R. 36 M. 414 at 417: 22 M.L.J. 109

5. (1899) 1 Q.B. 714.

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name The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case In that case the action would be an action solely against the surviving partners At common law, if a creditor sued joint debtors and one died, the survivors only could be sued Since the Judicature Act, undoubtedly, in the case of a partnership liability, the creditor might now join in one action the surviving partners, and the legal personal representatives of the deceased partner, but the latter would have expressly to be added as defendants If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. I may mention that the reason why the partnership assets can be reached is because, notwithstanding the dissolution by death, the surviving partners for many purposes have authority continued to them to bind the dead man's interest in the partnership assets, for the authority of partnership extends to enable the surviving partners, in case of dissolution by death, to wind up the affairs of the partnership, to pay the partnership debts, to defend claims against the partnership, and so forth *see* Lindley on Partnership, 5th Ed., pp 217, 218 and 587.''

Evidently it was not the intention of the Indian Legislature to depart from the above statement of law in England since we do not find any such indication in the provisions of the Civil Procedure Code. No doubt Order 30, Rule 4 is new and there is no corresponding provision in the English rules, but Rule 4 only gives the legal representatives a right to apply to be made a party to suits in the name of firms. It has been enacted in the Code evidently, to obviate difficulties that might otherwise be suggested, having regard to the provisions of section 45 of the Indian Contract Act. But it does not in our opinion enable a decree-holder to claim the right now claimed by him before us.

The case before us is not the case of a partner dying after suit. The deceased partner in the case before us had no opportunity of contesting the suit, neither had the legal representatives of the deceased partner any such opportunity. If the decree-holder's contention regarding Order 21, Rule 50 be accepted, then the only question that could be decided in an inquiry under that sub-rule being whether a particular person was a partner or not, no other contentions relating to the suit could be raised or tried at the instance of the legal representatives. The correctness of a decree could not be impugned in execution proceedings. The legal representatives would thus be deprived of all defence to the suit. The other surviving partners could not have any right to represent a deceased partner except as regards partnership properties Thus the contention of the decree-holder involves manifest injustice to the estate of the deceased partner and

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unless there be anything in any enactment compelling us to uphold that contention, it seems to us that we should avoid such a conclusion if possible. It thus being clear that so far as the private estate of the deceased partner is concerned, there has been no representation in the suit, the legal representatives of the deceased partner so far as the personal estate of the deceased is concerned could not be held in any way to be bound by the decree obtained by the plaintiff against the firm. In our view if the legislature wanted to go further than the English practice on the point, it would have made sub-rule (2) of Order 21, Rule 50 clear on the point; and having regard to the decision of the Court of Appeal in the case of *Ellis* v. *Wadeson*,[5] given on the corresponding provisions of the English Rules (which are practically the same as the provisions of the present Civil Procedure Code), we think that the contention of the decree-holder should be disallowed. No suit can be instituted against a dead person and a plaint filed against a dead person is a nullity, 'even when the suit is instituted *bona fide* and in ignorance of the death of the defendant.' See *Veerappa Chetty* v. *Tindal Ponnen*[6] (per Wallis and Miller, JJ.) and *In re Arunachalam Chettiar*.[7] It cannot be said that in the present case there were any valid proceedings in which the personal estate of the deceased Badrudeen Sahib could be said to have been represented in law. The question has not been discussed in either of the cases reported in *Jivraj* v. *Bhagvandas*[8] or *Motilal* v. *Chandmal*[9] nor have the English decisions been referred to therein. We agree generally with the more recent decision of the Bombay High Court reported in *Mathuradas Canji* v. *Ebrahim Fasulbhoy*.[1] No doubt the learned Judges there remarked that the firm concerned in that case had been dissolved to the knowledge of the plaintiff before the institution of the suit by reason of the death of a partner. But for the reasons already given we think that the circumstance that the plaintiff had no knowledge of the death of a partner before the institution of the suit does not make any difference on the question now before us, and unless the legal representatives had been made parties to the suit, the personal estate of the partner who died prior to the institution of the suit, in the hands of the legal representatives, could not be made liable in

1 (1927) I.L.R. 51 B. 986
5 (1899) 1 Q.B. 714
6. (1907) I L R 31 M 86: 17 M L J. 551
7 (1915) 2 L.W. 828 at 830
8 (1922) 24 Bom L.R. 1037
9. (1923) 25 Bom. L.R. 1081

execution of a decree obtained against the firm, and the plaintiff in such a case is not entitled to apply for leave under Order 21, Rule 50 (2).

The new provisions introduced in the Civil Procedure Code of 1908 are only enabling provisions which may be taken advantage of by a plaintiff who wishes to institute suits against firms. There are some advantages undoubtedly in following that procedure, but at the same time there are some disadvantages also as the case before us emphasises. The language of Order 21, Rule 50 (2) in terms applies only to a person who is alleged to be a partner and does not apply to legal representatives of a partner who was dead before the plaint was filed. The scope of that sub-rule cannot be enlarged by reference to the rule of service prescribed by Order 30, Rule 3. Sub-rule (4) of O. 21, Rule 50 is very clear, that "save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer". A reference to the rules of the Supreme Court makes it reasonably clear that in execution of a decree obtained against a firm as such, the separate property of a partner who was dead at the date of the issue of the writ cannot be proceeded against in execution; and in our opinion that seems to be the law which is sought to be reproduced in the provisions of the present Civil Procedure Code. The plaintiff as soon as he ascertained the facts would have applied to amend his claim by adding the personal representatives of the deceaesd partner. He did not choose to do so, and preferred to take his chance on the point of law.

The answer to the question referred to us is accordingly in the negative.

A.S.V. *Question answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Rolla Subbadu, minor, by next friend Rolla Rogadu and others .. *Appellants** (*Plffs.*)

v.

Somisetti Seshayya Chetti and others .. *Respondents* (*Defts.*).

Limitation Act (IX of 1908), Ss 19 and 31 and Art. 132—Mortgage—Acknowledgment subsequent to the period of twelve years but within the extra period allowed by section 31—Validity

The words "period prescribed for the suit" in section 19 of the Limitation Act are not limited strictly to the period prescribed by Schedule I of

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*S.A. No 966 of 1925. 26th April, 1929.

Subbada v. Somisetti Seshayya Chetti.

the Act, but include, in the case of a suit on a mortgage, the extra period of limitation given by section 31 of the Act, and an acknowledgment of the mortgage debt which is otherwise valid will not, therefore, be the less so if it is given after the period prescribed by Article 132 of the Act provided it is within the additional period allowed by S 31 of the Act

Sheo Partab Singh v *Tajammul-Husain,* (1926) I L.R. 49 All. 67 followed

Murugesa Mudali v. *Ramaswami Chettiar,* (1913) 26 M L J 23 referred to.

Second appeal against the decree of the District Court of Nellore in A.S. No. 227 of 1924, preferred against the decree of the Court of the Subordinate Judge of Nellore in O.S. No. 4 of 1923 (O.S. No. 25 of 1921, District Court, Nellore).

P. Chenchiah for appellants.

S. Varadachariar and *S. V. Venugopalachari* for respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. The question raised in this Second Appeal is one of limitation. The plaintiffs' suit was based upon a hypothecation bond, dated 31st March, 1897, executed by the father of the defendants 1 and 2 and his co-parceners. According to the decision in *Vasudeva Mudaliar* v. *Srinivasa Pillai*[1] the suit would have been time-barred having been instituted only in 1921, that is, beyond 12 years from the date of the hypothecation bond. By virtue of section 31 of the Limitation Act the plaintiffs had time to file the suit until 7th August, 1910. Before that date an acknowledgment of liability was made by the 1st defendant in the insolvency schedule filed by him on 6th May, 1909. This ackowledgment was made more than 12 years after the date of the bond, that is, beyond the ordinary period of limitation prescribed by Art. 132 of the Limitation Act but within the two years extra time allowed by section 31 for instituting the suit. The question is whether this acknowledgment, dated 6th May, 1909, is a good acknowledgment within the meaning of section 19 of the Limitation Act. If it is a good acknowledgment then the present suit is in time and the decision of the Lower Courts on this point will have to be set aside.

Section 19 of the Limitation Act requires that the acknowledgment to be effective should have been made before the expiration of the period prescribed for the suit. It is argued by Mr. Varadachariar for the respondents that the "period prescribed" in section 19 of the Limitation Act should be limited to the period prescribed in the first schedule of the Act and should

1. (1907) L.R. 34 I.A. 186: I.L.R. 30 M. 426: 17 M.L.J. 444 (P.C.).

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not be extended to apply to the special period of two years mentioned in section 31 of the Act which has been allowed only as a matter of grace by the legislature to relieve cases of hardship caused by the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai*.[1] This argument is not without force but it was not accepted by the learned Judges of the Allahabad High Court in *Harish Chandra* v. *Kastola Kunwar*,[2] *Sheo Partab Singh* v. *Tajammul Husain*[3] and *Abdul Ghani* v. *Chiranji Lal*,[4] all of which are cases directly in point. The head-note of the case in *Sheo Partab Singh* v. *Tajammul Husain*[3] correctly represents the view accepted in Allahabad. It states that "the period prescribed for the suit" as that expression is used in section 19 of the Indian Limitation Act, 1908, is not limited strictly to the period prescribed by Schedule I, but will include, in the case of a suit on a mortgage, the extra period of limitation given by section 31 of the Act, and that "an acknowledgment of the mortgage debt which is otherwise valid will not, therefore, be the less so if it is given after the period prescribed by Art. 132, provided that it is within the additional period allowed by section 31." The present question did not arise for decision in any other High Court. In *Shevdas Daulatram* v. *Narayen*[5] it was held that the two years' period specified in section 31 of the Limitation Act was not the period of limitation prescribed within the meaning of section 4 of the Limitation Act. It would follow from this decision that the extra period mentioned in section 31 would not be the "period prescribed" for purposes of section 19 also. It is not necessary to discuss the other cases of the Bombay High Court, *Bai Hemkore* v. *Masamalli*,[6] *Dayaram* v. *Laxman*[7] and *Visram* v. *Tabaji*.[8] The decision in *Shevdas Daulatram* v. *Narayen*[5] was dissented from in *Hira Singh* v. *Musammat Amarti*.[9] In Madras, Sadasiva Aiyar and Spencer, JJ., following *Hira Singh* v. *Musammat Amarti*[9] and dissenting from *Shevdas Daulatram* v. *Narayen*[5] held that section 4 of the Limitation Act can be invoked in computing the period prescribed by section 31 of the Limitation Act; if this is so, it must follow that the "period prescribed" in section 19 should be extended to apply to the special period of two years specified in section 31 of the Act and should not be limited to the period prescribed by the first schedule of the Act. In

1 (1907) L.R. 34 I.A. 186: I.L.R. 30 M. 426: 17 M.L.J. 444 (P.C.).
2 (1924) 80 I.C. 743.
3. (1926) I.L.R. 49 A 67.
4 (1927) I.L.R. 49 A. 726
5 (1911) I.L.R. 36 B. 268.
6 (1902) I.L.R. 26 B 782
7. (1911) 13 Bom. L.R. 284.
8. (1912) 15 Bom. L.R. 348.
9. (1912) I.L.R. 34 A. 375.

Subbarayan v. *Natarajan*[10] Spencer, J., expressed the view that the words "period of limitation'' prescribed in section 15 (1) of the Act mean the "period prescribed by the schedule" and Ramesam, J., stated that "a period of limitation" does not include a mere period of limitation such as that given by sections 6 and 8. But in that case neither section 31 of the Limitation Act nor section 19 was considered. The view of Reilly, J., in Second Appeals Nos. 824, 926 and 1094 of 1925 lends general support to the appellants' arguments.

As already noticed, the only decision of our Court which has a bearing on the present question follows the Allahabad view and dissents from the view expressed in the Bombay High Court. Sitting as a single Judge, I am bound to follow the decision in *Murugesa Muduli* v. *Ramasami Chettiar*[11] which is a decision by a Bench. Applying this decision I would hold that the acknowledgment by the 1st defendant in the present case is a valid acknowledgment under section 19 of the Limitation Act and the plaintiffs' suit is therefore not barred by limitation.

As the other points in the case have not been argued, the case will be posted for fresh arguments at a convenient date.

This case coming on for hearing this day, the Court delivered the following

JUDGMENT.—There is one more question of limitation to be decided in this case. It is contended that the acknowledgment made by Papiah on 6th May, 1909, cannot be operative and binding on the defendants because Papiah made the acknowledgment after he had alienated the property of Ex. I on 22nd February, 1909. This question arises because the defendants now claim title to the property through the purchaser under Ex. I. This point was raised before the Subordinate Judge but the learned District Judge has not dealt with it. He has also not dealt with the other issues in the case, as he disposed of the case only on the question of limitation on which I have reversed his finding.

I would therefore set aside the decision of the District Judge and remand the case to the Lower Court for disposing of it according to law after deciding the remaining question of limitation and the other issues in the case. The appellant will get his costs in this Court.

The Court-fee will be refunded.

Permission granted for Letters Patent Appeal.

N.S. *Appeal allowed and case remanded.*

10. (1922) I.L.R. 45 M. 785: 43 M.L.J. 168. 11. (1918) 26 M.L.J. 28.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Koppaka Brahmanandam .. *Appellant* in appeal sought to be preferred against the decree of the Court of the Subordinate Judge of Ellore in C.C. No.* 15 *of* 1926 *in O.P. No.* 24 *of* 1926

v.

The Secretary of State for India in Council represented by the Collector, West Godavari and another .. *Respondents in do. (Referring Officer).*

Brahmanandam v. Secretary of State for India in Council.

Court Fees Act (VII of 1870), *S* 8—*Acquisition of land under the Land Acquisition Act—Award of compensation by Court on reference—Appeal by claimant—Valuation—If should include the* 15 *per cent of the excess market value*

An appellant whose lands were acquired under the Land Acquisition Act but who, being dissatisfied with the amount of compensation awarded to him by the Court on a reference made to it under S 18 of the Act, appeals to the High Court, is bound to include in the valuation of his appeal the amount of 15 per cent of the excess market value and pay Court-fee thereon.

The Secretary of State for India in Council v *Shanmugaraya Mudaliar,* (1893) L.R. 20 I.A. 80. I.L R. 16 Mad 369 (P C) distinguished.

Appeal sought to be preferred against the decree of the Court of the Subordinate Judge, Ellore, in C.C. No. 15 of 1926 in O.P. No. 24 of 1926,

V. Viyyanna for appellant.

The Government Pleader for respondents.

The Court delivered the following

JUDGMENT.—The question that has been referred to me is whether an appellant whose lands were acquired under the Land Acquisition Act (I of 1894) but who, being dissatisfied with the amount of compensation awarded to him by the Court on a reference made to it under S. 18 of the Act, appeals to the High Court is bound to include in the valuation of his appeal the amount of 15 per cent. of the excess market value and pay Court-fee thereon, or whether he is entitled to value his appeal only at the excess market value claimed by him and pay Court-fee on that amount only, while insisting in case of success in the appeal that he should be decreed not only the

*S.R. No. 17672 of 1928 19th April, 1929.

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excess market value claimed by him but also 15 per cent. on the same.

The answer to this question turns on the proper construction to be placed on S. 8 of the Court Fees Act. S. 8 runs in these terms:

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant"

It was argued on behalf of the appellant that under S. 23, sub-section (1) of the Land Acquisition Act, the amount of compensation to be awarded is determined by the considerations mentioned in clauses (1) to (11) of the section and that in construing section 8 of the Court Fees Act, the expression "the amount awarded" should be taken to cover only the amount awarded having regard to the considerations mentioned in clauses (1) to (6) only of section 23 and that the expression "amount claimed" in S. 8 should also receive a similar construction. I am unable to accede to that contention. Under the Land Acquisition Act it is the amount of compensation that should be allowed for the land that has to be determined, and in determining the amount of compensation the Court has to take into consideration not only the provisions of clauses (1) to (6) of S. 23, sub-section (1), but also the provisions of sub-section (2) of that section. Sub-section (2) of section 23 expressly enacts:

"In addition to the market value of the land as above provided, the Court shall in every case award a sum of 15 per centum on such market value in consideration of the compulsory nature of the acquisition."

As I understand the Act, the amount of compensation to be awarded includes not only the market value but also the 15 per cent. on such market value. A reference to the other sections of the Land Acquisition Act, in my opinion, makes this clear. Under section 11 the Collector shall make an award of the compensation which in his opinion should be allowed for the land, and also "the apportionment of the said compensation among the claimants." Again under section 31, "the Collector shall tender payment of the compensation awarded by him to the persons interested"; and if they did not consent to receive it, "the Collector shall deposit the amount of compensation in the Court to which a reference under section 18 would be submitted." It is clear that the expression "amount of compensation awarded by the Collector" in section 31 includes not only the market value but also the 15 per cent. thereon, since it is clear that the Collector is bound to tender to the claimants the said 15 per cent. also

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and to deposit the same in Court if the claimants did not consent to receive the same. Again section 15 of the Act enacts that "in determining the amount of compensation, the Collector shall be guided by the provisions contained in sections 23 and 24," that is, not only by the provisions of sub-section (1), caluses (1) to (6) of section 23, but also by sub-section (2) of section 23.

It seems to me to be clear that the extra amount of compensation claimed by the appellant in an appeal should under section 8 of the Court Fees Act include also the 15 per cent. of the market value and that he should pay Court-fee on the total amount including the 15 per cent. He cannot, it seems to me, value his appeal only at the excess market value claimed by him in the appeal, and at the same time in case of success, not only claim to have that excess market value decreed to him but also claim that the appellate decree should automatically give him an additional 15 per cent. of the said excess market value. An appeal is different from the claim put forward by him before the Collector. When once the Court, on a reference to it under section 18 of the Land Acquisition Act, determines the amount of compensation to be awarded for the land acquired, the claimant, if dissatisfied with the amount of compensation so awarded by the Court, should, in case he prefers an appeal, value his appeal at the figure which represents the difference between the amount of compensation awarded to him and the amount of compensation that he claims in the appeal. The amount of compensation awarded to him includes, in my view, the 15 per cent. also of the market value, and the extra amount of compensation that he claims in the appeal should also include the 15 per cent. of the excess market value which he claims in the appeal.

Of course it is open to an appellant in a land acquisition appeal, as in any other appeal, in which he claims a sum of money from the other side, to give up a portion of his claim and confine his claim to any particular amount to which he may restrict his claim in appeal. In such cases he is of course bound to pay Court-fee only on the amount to which he has so confined his claim in the appeal; but in such a case, in the event of success in his appeal the decree of the Appellate Court should award only the amount claimed by him in the appeal, and not more. *Mahomed Ali Amjad Khan* v. *Secretary of State for India.*[1] In the case before me, the appellant, while valuing his appeal at the

1. (1903) I.L.R. 30 C. 501.

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extra market value only, claims in the event of success an extra 15 per cent. also. To entitle him to do so I think, on a proper construction of section 8 of the Court Fees Act, that he is bound to include in the valuation of his appeal the extra 15 per cent. also and pay the Court-fee due on the total amount.

No reported decision on the exact point that I have to decide now has been brought to my notice either by the learned Advocate for the appellant or by the learned Government Pleader. The appellant however relied on the observations of the Privy Council in the Mahabalipuram Land Acquisition case reported in *The Secretary of State for India in Council* v. *Shanmugaraya Mudaliar.*[1] The observations relied on are at pages 376, 377 and 379. I am of opinion that the observations relied on by the appellant do not really help me in the decision of the present question. The Privy Council had not to decide any question as to the proper amount of Court-fee payable in a land acquisition appeal. The decision itself was passed under the provisions of the Land Acquisition Act (X of 1870).

The learned Government Pleader drew my attention to sections 11, 13 and 24 of the old Act of 1870 and also to sections 11, 15 and 23 of the present Act. Sub-section (2) of section 23 of the present Act (I of 1894) does not find a place in section 24 of Act X of 1870. On the other hand section 42 of the old Act provided as follows:

> "In addition to the amount of any compensation awarded under Part II or Part III of this Act, the Collector shall, in consideration of the compulsory nature of the acquisition, pay 15 per centum on the market value mentioned in section 24"

The observations of the Privy Council relied on by the learned Advocate for the appellant were made with reference to the provisions of section 42 of the old Act, and, as already mentioned, do not help me in deciding the question of Court-fee now referred to me. I may note that in cases of appeals by the Government in Land Acquisition cases, it has been held in S.R. No. 9324 of 1923 that the Government should pay *ad valorem* Court-fee on the amount of compensation decreed to the claimant to which objection is taken in appeal.

For the above reasons, I have come to the conclusion that the appellant in the recent appeal, in case he wished to have the 15 per cent. also included in the appellate decree in case of his success, is bound to include the said 15 per cent. also in the valuation of his appeal and pay Court-fee on the total amount.

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1. (1893) L.R. 20 I.A. 80: I.L.R. 16 M. 369 (P.C.).

I answer the question referred to me accordingly, and give leave to the appellant to amend the valuation given in the appeal memorandum, should he elect to do so, and pay Court-fee thereon within one week after re-opening of the High Court in July, 1929.

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N.S. *Reference answered in favour of Government.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD CARSON, LORD SALVESEN AND SIR GEORGE LOWNDES.

Saiyid Qasim Husain and others .. *Appellants**

v.

Habibur Rahman and others .. *Respondents.*

P. C.

Saiyid Qasim Husain v Habibur Rahman.

Mahomedan Law—Dower—Claim by widow for—Nature of—Charge in respect of—Decree creating—What amounts to—Competence of Court to pass such a decree.

Under the Mahomedan Law, a widow claiming dower from her deceased husband's estate is in no better position than any ordinary creditor, and a *bona fide* purchaser for value from the heir would get an unassailable title.

H, a Shiah Mahomedan, executed certain deeds by which he disposed of his immoveable properties. He died subsequently, leaving *A*, his sister, his sole heir. Shortly after his death, his widow instituted a suit against *A*, the persons interested in her husband's alienations, and certain other creditors of her husband. She claimed by her plaint that those alienations were invalid, and that she was entitled to recover her dower debt from the properties. She prayed for a decree for a certain sum, for a declaration that the properties specified in the schedules to the plaint were "the heritage" of *H*, and that "the plaintiff be empowered to recover her decree from them." A specific issue was raised at the hearing of that suit, "whether the dower debt . . can be realised from the properties mentioned in the plaint." The decree passed in the suit in favour of the widow ordered "and decreed that this suit be decreed with costs and interest ....., that Rs. 40,000 and one gold mohur......be declared the dower debt of the plaintiff, that the properties entered in Schedules Nos. 1 and 2 to the plaint be treated to be the properties of *H*" (the husband) "from which the plaintiff is entitled (to recover) the decretal money."

Held that the decree, on its true construction, created a charge on the properties in respect of the dower debt of the widow.

The widow in her suit was not seeking merely to be put in a position to execute a money decree against the estate, but was asking the Court by its decree to imprint upon the properties a specific liability to satisfy the dower debt, or in other words to charge the properties with the payment of this particular debt.

Semble it was within the competence of the Court in the widow's suit to make a declaration creating a charge

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*P.C. Appeal No. 45 of 1927. 15th April, 1929.

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Saiyid Qasim Husain v. Habibur Rahman.

Appeal No. 45 of 1927 from a decree of the High Court, Patna, (Ross and Kulwant Sahay, JJ.), dated the 19th March, 1926, reversing an order of the Subordinate Judge of Patna, dated the 23rd June, 1925.

The material facts of the case appear sufficiently from their Lordships' judgment. The case in the High Court is reported in 95 Indian Cases 367.

The main question for determination on the appeal to the Privy Council was whether the terms of a decree made in a suit instituted by the widow to recover her dower debt operated to create a charge on the properties in dispute. The Subordinate Judge decided the question in favour of the appellant, but the High Court took the opposite view.

The dower suit was contested, and the third issue therein was the following:—

"(3) Whether the dower debt, if any, can be realized from the properties mentioned in the plaint?"

After hearing the evidence produced by the parties the Subordinate Judge (in the said suit for dower) delivered judgment on the 31st January, 1918. He described the nature of the suit in the following words:—

"The plaintiff has brought this suit for the recovery of Rs 40,000 and Rs. 15 as the price of one gold mohur as her dower with declaration that the properties described in Schedules 1 and 2 of the plaint are charged for the payment of the said amount "

The learned Subordinate Judge found the above issue in favour of the widow, saying:

"I also find that the dower debt of the plaintiff is recoverable from the properties mentioned in Schedules 1 and 2 of the plaint "

The learned Subordinate Judge therefore made a decree, allowing the widow's claim, in the following words:—

"It is ordered and decreed that this suit be decreed with costs and interest at the rate of 6 per cent per annum from this date up to the date of realization, that Rs 40,000 (forty thousand) and one gold mohur worth Rs. 15 be declared the dower debt of the plaintiff, that the properties entered in Schedules 1 and 2 to the plaint be treated to be the properties of Khaja Azhar Husain from which the plaintiff is entitled (to recover) the decretal money, that defendants Nos 2, 3 and 4 do pay to the plaintiff the costs of this suit with interest thereon at the rate of 6 per cent. per annum up to the date of realization, and that Rs 40,015 on account of the money claimed and Rs 2,099-4-0 on account of the costs of the suit with interest at the rate of 6 per cent per annum from this date up to the date of realization be paid by defendants Nos. 2 to 4 (*sic*) to the plaintiff."

[*Note*—The properties now in question were included in Schedules Nos 1 and 2 mentioned above, and the present appellants contended that

these properties were liable to discharge the amount due under the above decree.]

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Dube for appellants.

Dunne, K.C. and *Abdul Majid* for respondents.

15th April, 1929. Their Lordships' judgment was delivered by

Sir George Lowndes.

Sir George Lowndes.—The appellants are the representatives of Izatunnissa Begam, the widow of one Azhar Husain, a Shiah Mahomedan, who died in 1916. His sole heir according to the Shiah law was his sister Ahmadi Begam. Izatunnissa Begam was entitled on her husband's death to a dower of Rs. 40,000 and one gold mohur of the value of Rs. 15. Azhar Husain in his lifetime had executed certain deeds by which he purported in effect to denude himself of his immoveable properties, which were of considerable value. Shortly after his death Izatunnissa Begam took proceedings in the Subordinate Judge's Court at Patna to enforce her dower claim. She impleaded in her suit as the principal defendants Ahmadi Begam and the other persons interested in Azhar Husain's alienations and as *pro forma* defendants certain other creditors of the deceased. She claimed by her plaint that these alienations were invalid, and that she was entitled to recover her dower debt from the properties. She prayed for a decree for the Rs. 40,015, for a declaration that the properties specified in the schedules to the plaint were "the heritage" of Azhar Husain, and that "the plaintiff be empowered to recover her decree from them." A specific issue was raised at the hearing "whether the dower debt ...can be realised from the properties mentioned in the plaint." The Subordinate Judge on the 31st January, 1918, decided in Izatunnissa's favour, and by his decree it was ordered

"and decreed that this suit be decreed with costs and interest at the rate of 6 per cent per annum from this date up to the date of realization, that Rs. 40,000 (forty thousand) and one gold mohur worth Rs. 15 be declared the dower debt of the plaintiff, that the properties entered in Schedules Nos 1 and 2 to the plaint be treated to be the properties of Khaja Azhar Husain from which the plaintiff is entitled (to recover) the decretal money."

There was no appeal from this decree, which is therefore binding between the parties, and the only question now is whether on a proper construction of the decree the dower debt was charged upon the properties.

In July, 1923, while the greater part of this debt was still unsatisfied, Ahmadi Begam, as the heir of Azhar Husain, sold

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two of the scheduled properties to the first and second respondents, who alone are contesting this appeal. It is admitted that they had full knowledge of the decree in the dower suit, and in fact they claim that the decree was mortgaged to them by Izatunnissa. If therefore the decree created a charge upon the properties, it is clear that (apart from any question of the mortgage) they bought the properties subject to the charge.

Izatunnissa died in September, 1923, leaving as her heirs the first, second and third appellants, who assigned a share in the decree to the other appellants On the 26th January, 1924, the appellants applied for execution of the decree by sale of the properties, including those sold to respondents 1 and 2, which were attached at the instance of the appellants. The contesting respondents applied to set aside the attachment. The Subordinate Judge held that the decree created a charge upon the properties, and that therefore the respondents' claim was not maintainable. If this view is correct it was probably unnecessary to attach the properties in realisation of the decree. Proceedings were taken in review of this order, and the case was remitted by the High Court for further investigation. The Subordinate Judge then allowed an amendment of the application for execution, bringing the first and second respondents on the record as representatives of the judgment-debtors and making it clear that execution was sought by way of enforcement of the charge. Allegations were made by the respondents that Izatunnissa had been a party to certain mortgages executed by Ahmadi Begam in their favour and had also mortgaged her decree to them. These allegations were denied by the appellants. The documents are not on the record of this appeal, nor is there any material from which it would be possible for their Lordships to come to any safe conclusion on this part of the case.

In the event the Subordinate Judge affirmed his previous decision, that the decree created a charge upon the properties, and finally rejected the respondents' claim.

On appeal to the High Court the learned Judges say that the principal point argued before them on behalf of the present respondents was that the decree in the dower suit did not create a charge upon the properties, and upon consideration of the pleadings in the suit and the wording of the decree, they came to the conclusion that no charge was created. They thought that the only object of the suit was to free the properties from the alleged alienations of Azhar Husain and to make them available to satisfy the widow's claim for dower on the same footing

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as the other debts of the estate. It has not been disputed before their Lordships that a widow claiming dower from her deceased husband's estate is in no better position than any ordinary creditor, and that, apart from the decree, a *bona fide* purchaser for value from the heir would get an unassailable title. Their Lordships, however, are unable to agree with the interpretation put by the Judges of the High Court upon the decree. It is in their Lordships' opinion clear that the plaintiff in the suit was not seeking merely to be put in a position to execute a money decree against the estate, but was asking the Court by its decree to imprint upon the properties a specific liability to satisfy the dower debt, or in other words to charge the properties with the payment of this particular debt. They are therefore in agreement with the Subordinate Judge, that the decree created a charge upon the properties, and that the respondents 1 and 2 having bought with notice of the decree, their purchase was subject to the charge. Whether the charge was rightly decreed or not in the first instance is immaterial, though their Lordships see no reason to doubt that it was within the competence of the Court to make such a declaration. But the decree was not appealed against, and is clearly binding on the parties and those claiming under them.

A question was raised in the High Court as to the propriety of the amendment which brought respondents 1 and 2 upon the record, but the Judges thought it unnecessary to determine this question, and no reliance has been placed upon this contention before their Lordships.

It only remains to consider what the effective result of the appeal should be. Their Lordships are not, for the reason already stated, in a position to deal with the claim of respondents 1 and 2 to be themselves mortgagees of the dower decree. All they can do is to declare that the decree created a charge upon the scheduled properties, including those purchased by respondents 1 and 2, for the balance due under it for the dower debt. This charge will in any case have to be worked out by the executing Court, and when this question is taken up it will be open to the respondents 1 and 2, if so advised, to set up their claim as mortgagees from Izatunnissa Begam.

Inasmuch as the only competent question throughout the proceedings has been that of construction of the decree, upon which the appellants have succeeded, their Lordships think that the costs both here and below should be borne by the contesting respondents, and they will humbly advise His Majesty that the

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decree of the High Court should be set aside and the appeal allowed upon the terms of this judgment.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Francis & Harker.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD SHAW, LORD WARRINGTON OF CLYFFE, LORD ATKIN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Mohabbat Ali Khan .. *Appellant** (*Plff.*)

v.

Muhammad Ibrahim Khan and others .. *Respondents* (*Defts.*)

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*Mahomedan Law—Marriage—Presumption of—Conditions—Clan proclivity towards concubinage—Effect of, on presumption—Evidence of such clan proclivity—Admissibility of, on issue of marriage—Finding as to such clan proclivity on such evidence—Propriety of—Marriage—Issue as to—*Purdah *habit—Lady's non-observance of—Force and effect of—Acknowledgment by father involving assertion that he was married to mother of acknowledgee—Presumption arising from—*Onus *of rebutting—Witness—Credibility of—Evidence of, on one part of case false—Effect of his evidence on another part*

Where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan Law, the presumption is in favour of such marriage having taken place.

Khajah Hidayut Oollah v *Raj Jan Khanum*, (1844) 3 M.I.A. 295 followed

While recognising the force of such a presumption, the Court below held that in the case of a family like the one before it which paid scant regard to the matrimonial tie in the begetting of children from women of low caste, the presumption was so small as to be practically negligible, *held*, that no countenance could be given to the view of the Court below.

On an issue as to whether a man and a woman were or were not married to each other, evidence of a clan proclivity in the clan to which the parties belonged towards concubinage rather than marriage, was inadmissible. A Court of Law would not on such evidence pronounce a view to the effect that there was a clan proclivity towards concubinage rather than marriage, and therefore that marriage and the legal presumptions in favour of it cannot be sustained

It is no part of the law of India that to have lived and to remain behind the *purdah* is a necessary part of a lady's legal marriage or a conclusive evidential fact. It is a circumstance to be considered when the fact of the marriage is in issue But that issue is to be determined on a broad conspectus of the whole situation, including of course the *purdah* item.

Held that, in the case before their Lordships, the *purdah* item was by no means sufficient to interfere either with the presumptions of law or the balance of the proof of fact.

An acknowledgment by the father, involving the assertion that he was married to the mother of the acknowledgee, undoubtedly raises a presump-

*P.C. Appeal No. 53 of 1928. 7th March, 1929.

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tion in favour of the marriage and of the legitimacy The presumption is, no doubt, rebuttable, and if there is proof *aliunde* to the effect that there was no such marriage in fact, the same position is reached as if no such marriage had been possible In such a case the *onus* of proving that there was no marriage rests upon the party alleging the same

In judging of the credibility of witnesses on one part of a case deposed to by them, the fact that another part of the case to which they also deposed has been found to be false is a circumstance entitled to weight.

Appeal No. 53 of 1928 from a decree of the 24th January, 1927, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar, (Mr. H. Fraser), setting aside a decree, dated the 14th April, 1925, of the Court of the District Judge, Kohat.

The main question for determination on the appeal to the Privy Council was whether the appellant, Mohabbat Ali Khan, was the legitimate son of one Khan Sahib Khushdil Khan, by Musammat Babo.

The material facts of the case appear sufficiently from their Lordships' judgment.

On the question as to the plaintiff's legitimacy the two Courts in India differed. The District Judge decided that issue in the plaintiff's favour whilst the Appellate Court decided it in favour of the defendants.

The learned Judicial Commissioner said that the plaintiff's position was that his mother was legally married to Khushdil Khan about the year 1906, and that some time before he married her, she and her mother had been working in the house as maid-servants. There was no documentary evidence of the alleged marriage of Musammat Babo and Khushdil Khan, and the learned Judicial Commissioner came to the conclusion, on a consideration of the oral evidence, that the plaintiff had failed to establish the marriage by any direct evidence.

The learned Judicial Commissioner then considered the treatment of the plaintiff by his father and the members of his family in order to see whether their treatment would raise a presumption in favour of the plaintiff's legitimacy. He said:

"On behalf of the plaintiff it is contended that in view of the continuous cohabitation of Khushdil Khan with plaintiff's mother and the father's support of the boy, this treatment of him by the father and the father's family raises a presumption amounting to proof that the mother was the legally wedded wife of the father, as held by the District Judge I have already pointed out, however, that where fathers have such a scant regard for the matrimonial tie, their treatment of their maid-servants' offspring as sons raises no great presumption in favour of legitimacy "

De Gruyther, K.C., Parikh and *Syed Aslam* for appellant.
Dunne, K.C. and *Wallach* for respondents.

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De Gruyther, K.C.—The *nikah* marriage of the appellant's parents is proved. There was no legal impediment to their marriage.

In the course of the argument, reference was made to the following authorities:—

Khajah Hidayut Oollah v. *Rai Jan Khanum*,[1] *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*,[2] *Sadik Husain Khan* v. *Hashim Ali Khan*,[3] *Imambandi* v. *Mutsaddi*,[4] *Jamil-ud-din* v. *Abdul Majeed*[5] and *Fuzeelun Bebee* v. *Omdah Beebee*.[6]

7th March, 1929. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a decree of the Judicial Commissioner for the North-West Frontier Province, dated the 24th January, 1927, which set aside a decree, dated the 14th April, 1925, of the Court of the District Judge, Kohat. The District Judge had decreed that the appellant is the legitimate son of one Khan Sahib Khushdil Khan. The Judicial Commissioner reversed this judgment and dismissed the plaintiff's suit.

The plaintiff was born in 1906. It is not disputed that he is the son of Khushdil Khan by Musammat Babo. Various questions were raised in the case, but the only point remaining for determination in this appeal is whether the appellant is the legitimate son of Khushdil Khan, that depending upon whether Khushdil and Musammat Babo were married persons.

In August and September, 1923, Khushdil had serious attacks of illness, accompanied by paralysis and aphasia. While still suffering from these diseases he, on the 2nd April, 1924, executed a deed of gift by, as was alleged, making his thumb impression upon the deed after the provisions thereof had been carefully explained to and assented to by him.

This part of the case drops out, both Courts below having concurred in finding that Khushdil was proved to have been mentally incapable of understanding the deed on account of his illness, and that the deed was therefore invalid.

The remaining part of the suit, however, is head 1 of the plaint, which asks the Court to pronounce a declaratory decree "that plaintiff is the lawful son of the said Khan Sahib Khushdil

1 (1844) 3 M.I.A. 295

2 (1921) L.R. 48 I.A. 114: I.L.R. 48 C. 856: 40 M.L.J. 510 (P.C.)

3 (1916) L.R. 43 I.A. 212, 231: I.L.R. 38 A. 627: 31 M.L.J. 607 (P.C.).

4. (1918) L.R. 45 I.A. 73, 82: I.L.R. 45 C. 878: 35 M.L.J. 422 (P.C.)

5 (1915) 13 All. L.J. 361

6. (1868) 10 W.R. 469, 474.

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Khan," and upon this the Courts below have differed. If the plaintiff is the lawful son he is the sole male heir of Khushdil and the property rights in the deceased's estate would be regulated accordingly.

The question whether Khushdil and Musammat Babo were married is one of fact, and as such was investigated and has been summarized with the utmost care by the District Judge. A most important part of the case attempted to be made by the respondents was that such a marriage was legally impossible, because at the time of the marriage, and the birth of the appellant, the lady was already married to one Ilyas. The respondents plead that "her husband Ilyas died six or seven years ago and she was bound to him by *nikah* up to that time." Had this been established it would, of course, have been a complete answer to the appellant's suit. Both Courts below, however, have agreed that there was no such marriage, and that the body of evidence produced to that effect is altogether untrustworthy. As the District Judge puts it, "the story that Ilyas was married to Musammat Babo is fictitious."

What remains accordingly is of a limited scope. But it must be observed that the witnesses denying the marriage of Musammat Babo with Khushdil are very largely the same persons who allege the fictitious story of her marriage with Ilyas. This circumstance does not seem to have had attached to it by the Judicial Commissioner the weight which was its due.

It is unnecessary for the Board to recapitulate in detail the evidence given in the case. They are satisfied that the conclusion upon that evidence, oral and documentary, and taken as a whole, by the District Judge, was sound.

Was there a *nikah* ceremony? It is in evidence that it was solemnised by Imam, who is one of the witnesses: a cousin of the bride, now dead, acted as *padar vakil,* that is agent for the bride Two others who acted as the required witnesses are also dead. Three other persons have given evidence in support of the marriage. It is possible to criticise with much effect such oral evidence, but fortunately the case does not stand upon this alone. The life history of the parties has to be considered.

Upon that there can be no doubt that Khushdil, the father, acknowledged Mohabbat Ali Khan, the plaintiff, as his son, and this in circumstances which were clearly equivalent to an affirmation that he was a legitimate son. Shortly after the boy's birth, namely, in August, 1906, Khushdil Khan stated on oath that he

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had got a son. This meant the appellant, who was his only son at the time. Further, the son and his mother lived in family with Khushdil, and continued to do so from his birth in 1906 to the date of Khushdil's death in 1925. The circumstances of the family were these. Before the marriage to Musammat Babo, Khushdil Khan had already married thrice, but about the year 1903 only two of his wives were alive. By one of these wives he had one daughter. There were also born to him two sons by another of his wives, but they died before 1904, and he had only a daughter alive. As the Judicial Commissioner says in his judgment:

> "It seemed unlikely that he would beget a son from any of his existing wives, and in a desire to have male offspring he may well, argues counsel for plaintiff, have turned to a maidservant of his own household in the hope of obtaining it; there would, therefore, have been nothing unnatural in a marriage between the two"

The argument, the learned Commissioner thinks, is far from convincing, and he refers to a certain view which he entertains as to the practice of other members of the family than Khushdil. To that allusion will be subsequently made.

These being the domestic facts, it is not questioned that the appellant and his mother lived continuously in the deceased's house, and the appellant was brought up as one of his family.

One fact in particular may be alluded to. When the boy reached school age a notable circumstance is that Khushdil signed an application to the Headmaster, Government High School, Kohat, saying:

> "Sir,
>
> "I request you to kindly admit my son Mohabbat Ali in the school. The necessary information is given on reverse (below). I herewith produce the School Leaving Certificate I hereby declare that he has not been admitted so far in any recognised school."

The appended information includes the following:

> "Date of birth—1st January, 1906
> "Father's name—Khushdil Khan, Rais, Kohat
> "Caste or tribe—Mussalman, Afghan, Izzat Khel"

This is signed by Khushdil in his own hand, giving the particulars of his own son and his own tribe, the date being 11th April, 1919. Two years later a leaving certificate is given that "Mohabbat Ali Khan, son of Khan Sahib Khushdil Khan, attended the Government High School, Kohat District, from 11th April, 1919 to 2nd April, 1921." This certificate was applied for by Taj Mohammad Khan, a cousin of Khushdil, and in the application he referred to the appellant as "my brother's son, Mohabbat Ali Khan."

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Further, a number of transactions relating to land, and in revenue records, appear from documents produced, in which the appellant is described by Khushdil and his relatives and others as "Khushdil's son." The documents have been produced, and they are referred to in detail in the judgment of the District Judge; it is sufficient to say that they appear to demonstrate with clearness both the sonship and the legitimacy of the appellant. The father took much interest in his upbringing, and there are letters between both the father and the son on the one hand, and other members of the family on the other, showing that the interest in his upbringing and education was shared by these relations. Throughout the transactions and correspondence referred to, no suggestion of any kind appears to the effect that Mohabbat was illegitimate. The entire body of facts is confirmatory of his legitimacy.

The law applicable to such a case is quite settled. As Dr. Lushington, delivering the judgment of the Board, observed in *Khajah Hidayut Oollah* v. *Rai Jan Khanum*[1]:

> "Where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place"

According to Sir R. K. Wilson's "Digest of Anglo-Muhammadan Law," section 84:

> "In all cases in which marriage may be presumed by co-habitation, combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purposes of establishing paternity"

Section 85 may be also quoted:

> "If a man has acknowledged another as his legitimate child the presumption of paternity arising therefrom can only be rebutted by (to confine the instances to the one relevant).. (*d*) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledgee could have been begotten"

Evidence upon this last head was, as already mentioned, admitted under the allegation that the appellant's mother was married to Ilyas, but proof of the allegation completely failed.

The present case accordingly is one of an acknowledgment by the father, an acknowledgment which involves the assertion that he, the father Khushdil, was married to Musammat Babo, the appellant's mother. Such acknowledgment undoubtedly

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1. (1844) 3 M I.A. 295 at 318.

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raises a presumption in favour of the marriage and of the legitimacy.

The presumption is no doubt rebuttable, and if there is proof *aliunde* on the subject to the effect that there was no such marriage in fact, the same position is reached as if no such marriage had been possible. A recent instance of positive disproof of the marriage was *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*.[2] As Lord Dunedin put it:

> "Such acknowledgment in face of the fact that there was no marriage is of no avail,"

and the general law was summed up in the same judgment as follows:

> "A claimant son who has in his favour a good acknowledgment of legitimacy is in this position the marriage will be held proved and his legitimacy established unless the marriage is disproved Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact"

It would accordingly appear clear that it rests upon the respondents in this case to establish that there was no marriage.

It might not be considered necessary to enter into any question of presumption of proof, as their Lordships find themselves in agreement with the District Judge to the effect that the marriage is proved; and they do so on a broad induction of the oral and documentary evidence as a whole.

But their Lordships think it expedient to deal with the reasons which have induced the Judicial Commissioner to differ from the District Judge. He correctly says:

> "The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years There is ample authority for this position, which will be found cited in a ruling of the Lahore High Court, *Indar Singh* v *Thakar Singh*[3]."

He then proceeds as follows:

> "The strength of the presumption, however, will obviously vary according to the circumstances of each particular case, and the habits of the Izzat Khel clan in the matter of concubinage with maidservants and slave girls can scarcely be described as normal We know of four certified cases of sons born of slave girls (*kanizakzadas*) These are Mawaz, son of Sharbat; Manawar, son of Ata Mohammad Khan; Khushal, son of Nawab Bahadur Sher Khan, and Abdul Rahman, grandson of Nawab Bahadur Sher Khan It is on the record, or has been held by the Courts, that Mawaz was the only one of these four whose father entered into a lawful marriage with his mother The other three were the offspring of concubines outside wedlock The names of other *kanizakzadas* have been mentioned; so that there are at least four and probably several more of such cases amongst the immediate descendants of Sher Ali Khan, *i e*, the family with which we

2 (1921) L R. 48 I A 114 at 120, 121 · I L.R 48 C. 856 40 M.L.J 510 (P C)

3 (1921) I.L.R. 2 Lah 207.

are now concerned. The presumption in favour of legitimacy arising from continuous cohabitation over a period of years is one which is based on public policy, and in the case of Muhammadans, no doubt, on the well-known doctrine of Muhammadan Law, which abhors bastardy. In a family like the present, however, which pays scant regard to the matrimonial tie in the begetting of children from women of low caste, the presumption, in my opinion, must be so small as to be practically negligible It might operate as a factor to turn the scale where the evidence for and against a marriage is equal, but it is not sufficient to transfer from a claimant son some obligation to prove his own legitimacy So the burden of proof may be regarded as being equally distributed over the parties."

The Board think it right to say at once that it can give no countenance to the doctrine here set forth. It amounts to this, that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives; an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage. The suggestion further appears to be: that the facts of the particular case, in which evidence is given *pro* and *contra* bearing upon the issue of marriage, are not to be regulated by the well-known presumptions of law, but that these presumptions are to be wiped out by reason of the conduct and mode of life and predilections of other persons. Each case of each of these relatives would have required to be separately investigated on its own merits: without that, the way is opened for family gossip on a wide scale, prompted by motives unknown and knowledge untested.

A further suggestion of which their Lordships cannot approve appears to amount to this: that a Court of Law on evidence such as is given here would pronounce a view to the effect that there was a clan proclivity towards concubinage rather than marriage, and therefore that marriage and the legal presumptions in favour of it cannot be sustained.

Their Lordships think it right further to say that the evidence on this subject should not have been allowed by the District Judge. He attached no weight to it himself, but it was not only without weight, it was without competence.

It remains to be added that undoubted difficulty arises in the case on account of the fact that the mother of the appellant was not a purdanashin lady. The other wives lived behind the *purdah* according to the well-known Mahomedan habit. They were strict Mahomedans, young persons brought from Afghanistan. The third wife, Musammat Babo, had been in fact a maidservant and housekeeper in the household of the deceased. When the marriage took place she continued her duties in the household and was not purdanashin. Even if

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that had involved or recognised a lack or disregard of social status, these things were essentially matters for herself and her husband to consider. But it is no part of the law of India that to have lived and to remain behind the *purdah* is a necessary part of a lady's legal marriage or a conclusive evidential fact. It is a circumstance to be considered when the fact of the marriage is in issue. But that issue is to be determined on a broad conspectus of the whole situation, including of course the *purdah* item In the present case, it is by no means sufficient to interfere either with the presumptions of law or the balance of the proof of fact.

Their Lordships will humbly advise His Majesty to allow the appeal and to restore the judgment of the District Judge: the costs of the case from that date, that is to say, in the appeal to the Judicial Commissioner and to His Majesty in Council, to be paid by the respondents.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Ganapathi, minor by mother and guardian Vellayammal .. *Appellant** (31*st Deft.*)

v.

Subramaniam Chetty and others .. *Respondents* (2*nd Plff., Defts.* 2 *to* 5, 7, 9 *to* 24 *and* 26 *to* 30).

Ganapathi v. Subramanian Chetty.

Hindu Law—Joint family—Partition suit by father on behalf of himself and his minor sons against his own father, step-brother and his sons—Death of the plaintiff's father subsequent to suit—Subsequent death of plaintiff—Power of Court to refuse to decree partition in so far as minor plaintiff's interests are concerned—Mere filing of the plaint by the father if can be said to effect a separation of his minor sons from that date.

A suit for partition of joint family properties was filed by a Hindu father as the 1st plaintiff on behalf of himself and his two minor sons 2nd and 3rd plaintiffs against his own father, step-brother and the step-brother's two sons, who were the 1st, 2nd, 3rd and 30th defendants respectively in the suit During the pendency of the suit, the 1st defendant died and about eight months afterwards the 1st plaintiff also died On the 1st plaintiff's death, one of his sons, the 2nd plaintiff, who had attained majority by that time, elected to continue the suit on behalf of himself and his minor brother, the 3rd plaintiff. At the end of the trial but before the decree was passed, the 3rd plaintiff's mother applied to be made guardian of her minor son the 3rd plaintiff and stated that the partition was not in the interest

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*Appeal No 211 of 1926. 25th March, 1929.

of the 3rd plaintiff and that she did not want a partition so far as he was concerned The 3rd plaintiff was accordingly transposed as the 31st defendant The Court held that it was not open to the 3rd plaintiff to withdraw from the suit as he was bound by the act of his father, the 1st plaintiff and accordingly decreed the partition and allotted one-third share to the 2nd plaintiff for himself and his minor brother the 31st defendant

Held, (on appeal) that there had been no separation of the 3rd plaintiff from the family merely by reason of the filing of the plaint by his father as the latter died before the plaint resulted in a partition decree and that the Court must uphold the interests of the 3rd plaintiff and refuse partition, so far as his interests were concerned, as it would be prejudicial to his interests to decree such separation

When a declaration has been made of an intention to separate by the filing of a plaint for partition and such plaint has resulted in a partition decree, undoubtedly the date of separation would be the date of the filing of the plaint But, the mere filing of the plaint does not necessarily effect a final severance in status as the plaintiff may withdraw his declaration of intention in which case no severance would be effected, and consequently the mere filing of a suit for partition by a Hindu father on behalf of himself and his minor sons does not necessarily effect a separation of his minor sons from that date, unless it has been carried into effect by the passing of a decree by the Court.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O.S. No. 8 of 1920.

T. M. Krishnaswami Aiyar and *K. Rajah Aiyar* for appellant.

T. R Ramachandra Aiyar, B. Sitarama Rao, S. R. Muthuswami Aiyar, V. Ramaswami Aiyar and *R. Kesava Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS. *Phillips, J.*—In this suit the 1st defendant is the father of the 1st plaintiff and the 2nd defendant by different mothers. Plaintiffs 2 and 3 are the minor sons of the 1st plaintiff and defendants 3 and 30 are the minor sons of the 2nd defendant. The suit was instituted by the 1st plaintiff on behalf of himself and his minor sons for a partition. It is alleged that the 1st plaintiff wished to effect a partition in 1915 or 1916 but no partition appears to have been effected before this suit was filed in 1920 and it has not been shown that there was any separation in status. During the pendency of this suit, the 1st defendant died on 26th October, 1923, and in June, 1924, the 1st plaintiff died. On the 1st plaintiff's death, the 2nd plaintiff who had attained majority, elected to continue the suit on behalf of himself and his minor brother the 3rd plaintiff. At the end of the trial the 3rd plaintiff's mother applied to be made guardian of her minor son the 3rd plaintiff and stated that the partition was not in the interest of the 3rd plaintiff and that she did not want a partition so far as he was concerned. The 3rd plaintiff was accordingly transposed as the 31st defendant.

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The Subordinate Judge has held that it was not open to the 3rd plaintiff to withdraw from the suit as he was bound by the act of his father and has accordingly decreed the partition and allotted one-third share to the 2nd plaintiff for himself and his minor brother the 31st defendant. The latter now appeals, and the only question that arises for consideration is whether the minor 3rd plaintiff was separated in status from the defendants by reason of the father's unequivocal declaration of an intention to be divided in status. It is contended for the appellant that it is not to the 3rd plaintiff's interest to be separated from the family but the respondents contend that this question cannot now be considered because the 3rd plaintiff is bound by the father's declaration and became separated from the date of the filing of the plaint.

It is well settled that in a litigation in which a minor is concerned, the Court is bound to look after the interests of such a minor and this has been recognised so far back as 1866 in *Kamakshi Ammal* v. *Chidambara Reddy*,[1] which was followed in *Chelimi Chetty* v. *Subbamma*[2]. *Palani Goundan* v. *Kasi Goundan*[3] is to the same effect. It was also held in *Doraswami Pillai* v. *Thungasami Pillai*[4] that a minor's interest must be protected by the Court. In *Ganesha Row* v. *Tuljaram Row*[5] it was held that a compromise entered into by a father on behalf of his minor son without the leave of the Court was not binding on a minor. It is therefore clear that it is the duty of the Court to protect the interests of a minor party. The cases referred to were cases in which the minor was the sole plaintiff, but this cannot affect the principle. Ordinarily when a father sues on behalf of his minor son it may be presumed that he is acting in the interests of that son unless there is anything to show the contrary. If, however, it does appear to the Court that a father is not acting in the best interests of his son, on the principle set forth above the Court is bound to protect that son's interest even against the acts of his father. I cannot therefore accept the contention of Mr. Ramachandra Aiyar for respondents that the Court cannot interfere to protect a minor from the act of his father. Taking that view we have now to consider whether the filing of the partition suit by the father did actually effect a separation not only of himself

1 (1866) 3 M.H C.R. 94
2 (1917) I.L R. 41 M 442: 34 M.L J. 213.
3 (1919) 50 I.C. 552
4 (1903) I.L.R. 27 M. 377· 14 M L J 159
5. (1913) L.R 40 I.A. 132· I.L R. 36 M 295: 25 M L J 150 (P.C.).

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but also of his minor sons from the rest of the family, or whether it is open to the Court to refuse partition so far as the minor is concerned.

The first point to be considered is whether the filing of this plaint did constitute a final division in the family. When a declaration has been made of an intention to separate by the filing of a plaint for partition and such plaint has resulted in a partition decree, undoubtedly the date of separation would be the date of the filing of the plaint. But the mere filing of the plaint does not necessarily effect a final severance in status for it has been held that a plaintiff may withdraw his declaration of intention and that then no severance is effected. *Venni Reddy* v. *Nallappa Reddy*[6] and *Krishnaswami Naidu* v. *Perumal.*[7] This has been affirmed by the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar.*[8] There is a remark in the judgment in this latter case to the effect that the withdrawal must be before trial but that that means before a final decree is made clear by reference to *Palani Ammal* v. *Muthuvenkatachala Moniagar*[9] the same case before this Court from the judgment in which it appears that the withdrawal took place during the pendency of an appeal. In this view it would be difficult to hold that a declaration of intention by the father, which is subject to revocation, must necessarily effect a separation of his sons from that date. There is authority for holding that when a partition has been actually effected either by a decree, or by agreement between the parties, that partition effected by the father is binding on his sons and can only be questioned on some such ground as fraud or collusion. *Ramdas* v. *Chabildas,*[10] *Alur Lakshmi Narasimha Sastrulu* v. *Venkata Narasamma*[11] and *Umed Babar* v. *Kushalbhai.*[12] But that does not show that if the intention to separate has not been carried into effect, the sons will be equally bound. In the present suit, before the intention could be carried into effect by the passing of a decree, the father died. It would therefore appear that on the date of his death the minor sons had not been irrevocably divided from the rest of the family.

In the circumstances of the present case the inference of non-division is all the stronger because when the suit was filed the father of the whole family, *viz.*, the 1st defendant, was alive and was the head of the family. When, therefore, the 1st plaintiff

6 (1920) 11 L.W. 611 7 (1924) 20 L.W. 540.
8 (1924) L.R. 52 I.A. 83· I.L.R. 48 M 254. 48 M.L.J. 83 (P.C)
9. (1917) 33 M.L.J. 759. 10. (1910) 12 Bom L.R. 621.
11. (1918) 52 I.C. 614. 12 (1909) 2 I.C. 426.

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asked for a partition, the presumption that he would bind his minor sons by his actions is not so strong as if he were filing a suit against his brothers as head of his own branch. The 3rd plaintiff as grandson could himself have maintained a separate suit for partition, as also any one of the members of the 1st defendant's family. While therefore the filing of the plaint by the 1st plaintiff may be deemed to have effected his separation from the family because he did not revoke his declaration of intention, yet it does not necessarily effect a division between the 3rd plaintiff and the other members. In *Balabux* v. *Rukmabai*[13] and *Musammat Jatti* v. *Banwari Lal*[14] the Judicial Committee of the Privy Council has laid down that when one member of the family becomes separate there is no presumption that the remaining members remain united, and further that when there has been a separation between the members, there is no presumption that there is a separation between one of the members and his descendants. These however are only presumptions, and such presumptions may be rebutted by circumstantial evidence or otherwise, as is evident from the decision of the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar*,[8] where it was held that a separation of one member did not necessarily create a division between all the members, and it was observed that the decree has to be looked to to show whether the separation was only separation of the plaintiff from his co-parceners or was a separation of all the members from each other. It does not therefore necessarily follow that when the 3rd plaintiff's father effected a separation between himself and his family he effected a separation between his sons and their grandfather and uncle and to decide this point one must consider the circumstances of this case.

The observation of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi*[15] that the separation of the father effected a separation of his branch must be read in connection with the facts of the case and of the fact that their Lordships were merely considering the question of the date of separation and not of the factum of separation of the junior members. It seems to me on a consideration of all these authorities that the filing of the plaint by the 1st plaintiff did not necessarily effect a separation of the 3rd plaintiff as well. Before the partition was completed by a decree, representation was made to the Court that it would

8. (1924) L.R. 52 I.A. 83: I.L.R. 48 M 254: 48 M.L.J. 83 (P.C.).
13. (1903) L.R. 30 I.A. 130: I.L.R. 30 C. 725 (P.C.).
14 (1923) L.R. 50 I.A. 192. I.L.R. 4 Lah. 350: 45 M.L.J. 355 (P.C.).
15. (1922) L.R. 49 I.A. 168: I.L.R. 45 M. 489: 43 M.L.J. 428 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE, MR. JUSTICE BEASLEY AND MR. JUSTICE MADHAVAN NAIR.

Alagasundaram Pillai .. *Petitioner* (Respdt.-plaintiff)*

v.

Pichuvier, minor, by Court guardian Mr. S. Krishnaswami Aiyangar, High Court Vakil, Madras —*vide* order, dated 29th November, 1927, on C.M.P. No. 4407 of 1927 .. *Respondent (Petitioner-claimant).*

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Civil Procedure Code (V of 1908), O 21, Rr. 97 and 100—Proceedings under—Dismissal for default or ex parte *order—Power of Court to set aside—Civil Procedure Code, S 151 and O 9*

Order 9 of the Civil Procedure Code does not apply to such proceedings under Order 21, Rule 97 or 100 as do not also fall within S. 47, and the Court has no inherent power to set aside, on sufficient cause being shown, either an order dismissing for default an application under O. 21, R 97 or 100, or an order allowing such an application *ex parte*

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Madura Town, dated the 26th day of February, 1926, and passed in I.A. No. 145 of 1926.

P. R. Srinivasa Aiyangar and *P. N. Appusami Aiyar* for petitioner.

S. Krishnaswami Aiyangar for respondent.

The Court (Wallace and Tiruvenkatachariar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—The questions which arise in this case are whether (1) the provisions of Order 9, Civil Procedure Code, apply to proceedings instituted under Rule 100 of Order 21 of the Code, and (2) whether, otherwise, the Court has inherent power to set aside the dismissal for default of an application made under Rule 100 where the ends of justice render it necessary to do so. The material facts of the case are these: The petitioner before us obtained a decree for money in Small Cause Suit No. 955 of 1923 on the file of the Madura Sub-Court against the respondent's mother. In execution of that decree, the immovable properties to which the application relates were sold and purchased by the decree-holder himself. He subsequently obtained possession of those proper-

*C.R.P. No 234 of 1926. 1st May, 1929.

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ties through Court dispossessing the respondent who is a minor. The present application was thereupon put in on his behalf alleging that the applicant was in possession of the properties on his own account and praying that he should be restored to possession. Upon this application notice was ordered to the auction-purchaser and a date was fixed for the hearing of the application. On that date, when the case was called on, the applicant did not appear but the auction-purchaser did; and the application was therefore dismissed for default. The respondent's guardian thereafter applied under Order 9, Rule 9, for the setting aside of the order of dismissal. That petition was opposed by the auction-purchaser. The District Munsif after hearing both the parties ordered the restoration of the application. Against that order this Revision Petition has been preferred.

It is contended on behalf of the auction-purchaser who is the petitioner before us that the District Munsif acted without jurisdiction in restoring the application of the respondent under Rule 100 which had been dismissed for default as the application under Rule 100 is a proceeding in execution of a decree to which Order 9 does not apply. It is further argued that the order of the District Munsif is also bad as he has given no reasons for setting aside the order of dismissal and that on that ground also it should be set aside.

On behalf of the respondent it is argued that an application under Rule 100 is not an application in execution of a decree but that it is an independent original proceeding to which Order 9 applies by force of section 141, Civil Procedure Code. It is further argued that if Order 9 does not apply the Court which deals with such an application has inherent power in the interests of justice to restore the application which has been dismissed for default, which order also must be taken to have been passed by the Court in the exercise of its inherent power. These questions were argued before us at great length and we were referred to most of the authorities bearing on them. There is no doubt a conflict of authorities on both the questions. The authorities cited relate to the applicability of Order 9 not only to proceedings instituted under Rules 97 or 100 of Order 21 to which the auction-purchaser in the Court sale and a person not a party to the suit or decree are parties, but also to proceedings under Rule 90 for setting aside sales of immovable properties held in execution of decrees and to proceedings instituted by claimants under Rule 58 with reference to properties attached in

execution of decrees. The broad contention put forward on behalf of the petitioner (auction-purchaser) is that all such proceedings are proceedings in execution of a decree to which Order 9 does not apply; the leading authority for that contention being the decision of their Lordships of the Privy Council in *Thakur Prasad* v. *Fakir-ullah.*[1] It is also contended that the Court has no inherent power to restore an application dismissed for default, especially in those cases in which the Legislature itself has provided a remedy by suit. For the purposes of the present case it seems to us to be unnecessary to consider the question whether the applications which are instituted by third parties under Rule 58 preferring claims to properties attached in execution of a decree are proceedings in execution of the decree or whether they are independent proceedings in the nature of original suits though they relate to property attached in execution of the decree, nor is it necessary to consider whether an application under Rule 90 whether made by a judgment-debtor or decree-holder for setting aside a sale in execution of a decree should or should not be viewed as a proceeding in execution of a decree, as we consider that applications made under Rule 97 or 100 are in their nature essentially different. Those applications do not concern the parties to the suit or decree as such. When the auction-purchaser is also a stranger to the suit, the proceedings under Rule 97 or 100 are entirely between persons who are not parties to the suit or decree. Even when as in the present case the decree-holder himself is the auction-purchaser, it is not in his character as decree-holder that he is a party to such proceedings. Further, unlike applications under Rule 90 which are made during the pendency of applications for the execution of a decree and the result of which would materially affect the further course of the execution proceedings, the applications under Rules 97 and 100 come to be made when the execution of the decree is over. When the sale is confirmed, the decree is satisfied *pro tanto,* irrespective of whether the auction-purchaser is the decree-holder or a third party, and the result of the application under either of those rules will not affect the further course of the execution proceedings or re-open the execution of the decree to any extent. If the claim of the dispossessed party is allowed, the remedy of the auction-purchaser in such a case even when he is also the decree-holder is to file a suit as provided in Rule 103. We think, therefore, that the authorities which following the Privy Council decision in *Thakur Prasad* v. *Fakir-ullah*[1] lay down

1. (1894) L.R. 22 I.A. 44: I.L.R. 17 All. 106: 5 M.L.J. 3 (P.C.).

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that Order 9 does not apply to applications for execution of decrees or applications in execution of decrees do not affect applications made under Rules 97 or 100 which in our opinion cannot be regarded as applications either for execution of the decree or in execution of the decree. So far as the Privy Council decision in *Thakur Prasad* v. *Fakir-ullah*[1] is concerned upon which the learned Advocate for the petitioner chiefly relied, we are unable to accept his contention that any application whatever may be its nature and by whomsoever made must be deemed to be an application in execution of a decree, if it is made under any of the rules in Order 21. In that case their Lordships were dealing with an application for the execution of a decree which the High Court of Allahabad held was barred under section 373 of the old Code corresponding to Order 23, Rule 1 of the present Code, as the previous application for execution of the same decree had been withdrawn without an order of Court granting liberty to file a fresh application in respect of the same matter. Their Lordships held that the view taken by the Allahabad High Court was wrong and that section 373 which relates to suits does not apply to proceedings in execution. The petitioner's Advocate relies upon the following passage in their Lordships' judgment as laying down in broad terms that all proceedings, whatever may be their nature, which are made under any of the rules in Order 21 must be considered to be a proceeding in execution and that the procedure which is prescribed in the Code for suits does not apply to any of those proceedings. The passage relied on runs thus:

"It is not suggested that section 373 of the Civil Procedure Code would of its own force apply to execution proceedings The suggestion is that it is applied by force of section 647. But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth, and do not include executions That is the view taken by the High Court of Calcutta, after a consideration of the Allahabad decisions, in the case of *Bunko Behary Gangopadhya* v *Nil Madhub Chuttopadhya*.[2] On this construction of section 647 the reasoning of the High Court in *Sarju Prasad's* case falls to the ground. And it is clear, both from the Code itself and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a succession of applications for execution "

Chapter XIX of the old Code has in the present Code been re-enacted as Order 21. We do not think that their Lord-

1 (1894) L.R. 22 I.A. 44: I.L.R. 17 All 106: 5 M.L.J. 3 (P.C.).
2. (1891) I L R 18 C 635.

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ships, in observing that the whole of Chapter XIX of the Code consisting of 121 sections (now Order 21, Rules 1 to 103), are devoted to the proceedings in execution intended to lay down that every proceeding which may be taken under any rule of that chapter is a proceeding in execution whether in fact it concerns or not the execution of a decree. Their Lordships' observations though general in terms have to be construed with reference to the actual case which they had to decide and they have been so construed in those cases which were referred to us in which Order 9 has been held to be applicable not only to proceedings instituted under Rules 97 or 100 but also under Rules 58 and 90. As we have already observed we are not directly concerned in this case with the decisions passed with reference to the proceedings instituted under Rules 58 or 90.

The distinguishing feature between applications under Rules 97 and 100 and applications made under Rules 58 and 90 is that while the latter are made in the course of the execution proceedings with reference to pending applications for execution of the decrees, the former are quite unconnected with any pending application for the execution of the decree. An application under either of those rules which may be entirely between third parties and in which the questions raised do not in any way affect the execution of the decree cannot with any propriety be held to be a proceeding in execution merely because those rules occur in Order 21.

Confining ourselves to the authorities which relate to proceedings under Rules 97 and 100, we are of opinion that the view taken in those cases which hold that they are not proceedings in execution of a decree and that they are more in the nature of original proceedings to which Order 9 is applicable by force of section 141 is the sounder view to take, and we would ourselves have adopted that view in this case but for a direct decision of Devadoss, J., concurred in by Waller, J., in *Kaliakkal* v. *Palani Koundan*,[3] to the contrary. In that case which is directly in point the learned Judges have held that proceedings under Rules 97 to 101 are execution proceedings and therefore Order 9 does not apply to them. In that view they held that the District Munsif had no jurisdiction to set aside under Order 9, Rule 13 an *ex parte* order passed by him on the application made in that case.

The same view is taken in *Hari Charan Ghose* v. *Manmatha Nath Sen*,[4] but the opposite view is taken among others in

3. (1925) 50 M.L.J. 200.
4. (1913) I.L.R. 41 C. 1.

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Sheonandan Chowdhury v. *Debi Lal Chowdhury*[5] and *Satya Narayan Lall* v. *Govind Sahay.*[6] In *Hari Charan Ghose* v. *Manmatha Nath Sen*[4] Jenkins, C.J., rests his conclusions not only upon the interpretation of *Thakur Prasad* v. *Fakir-ullah*[1] but also on the ground that the circumstance that a remedy by suit is given is a clear indication that O. 9 should not, and does not, apply. With the latter part of the reasoning of the learned Chief Justice we are unable to agree. In an application made under Rule 100 all that the applicant has got to show is that when he was ousted from possession he was in possession on his own account and not on account of the judgment-debtor. If he establishes that fact his petition must be allowed. But if he is obliged to bring a suit to recover possession, he will have to make out that he has a good title to the property which is a much more onerous position. There seems to be no sufficient reason why, if a party to those proceedings, whether appellant or respondent, is unable for no default on his part to be present at the hearing and the application is either dismissed for default or ordered *ex parte*, he should be debarred from having it reheard and that he should be driven to a regular suit. The dismissal of an application for default is, as pointed out by their Lordships of the Privy Council in *Bakhsh Singh* v. *Habib Shah,*[7] intended to be a punishment for wilful default, and gross injustice will be done if it is to be inflicted in cases where there has been no default.

In *Ramappa Chettiar* v. *Ekambara Padayachi,*[8] which related to a claim petition, Venkatasubba Rao, J., overruled the contention that the restoration of a claim petition which was dismissed for default cannot be made, because under Order 21, Rule 63 the claimant has a right of suit. The contrary view that proceedings under Rules 97 or 100 are not proceedings in execution but are independent original matters in the nature of suits and that therefore Order 9 applies to such applications by force of section 141 is held in the following cases among others:— *Sheonandan Chowdhury* v. *Debi Lal Chowdhury*[5] and *Satya Narayan Lall* v. *Govind Sahay.*[6] In our opinion the claim which is put forward by a stranger to a decree in order to

1 (1894) L.R 22 I.A. 44. I.L.R. 17 All 106: 5 M.L.J. 3 (P.C).
4 (1913) I.L.R. 41 C. 1
5. (1923) I.L.R. 2 Pat. 372.
6. (1918) 3 Pat L.J. 250
7. (1913) L.R. 40 I.A. 151: I.L.R. 35 A. 331: 25 M.L.J. 148 (P.C).
8. (1924) 47 M.L.J. 13.

avail himself of the summary remedy given to him by Rule 100 for recovery of possession of immovable property from which he has been dispossessed is an original matter in the nature of a suit and it cannot by any stretch of language be considered to be a proceeding in execution of a decree. We need scarcely add that the enumeration of original matters in the nature of suits which are mentioned in their Lordships' judgment in *Thakur Prasad* v. *Fakir-ullah*[1] and on which the petitioner's Advocate laid stress are merely illustrative as the language used by their Lordships clearly shows. As regards the second question, if Order 9 does not apply to proceedings under Rules 97 to 100, then the dismissal of this application for default can be made only in the exercise of the Court's inherent power to dismiss any application which *prima facie* is not prosecuted. If that is so, it is difficult to see why the Court should not equally have the inherent power to set aside an order of dismissal when it is shown that the non-appearance was due to no default on the part of the applicant but to some accident which prevented him from appearing. In such cases no further application for the same relief can be put in, and it will work serious injustice if the Court can neither interfere under Order 9, Rule 9 or under the inherent power to set aside the order of dismissal which the Court would not have made if at that time it had been aware of the real facts of the case. In support of the view that the Court has such inherent power and that it is bound to exercise it where the interests of justice requires it to do so, we may refer to the case in *Bholu* v. *Ram Lal*,[9] which follows the decision of the Privy Council in *Bakhsh Singh* v. *Habib Shah*[7] already referred to. But there are observations in some other cases which imply that the Court has no such inherent power. Even as regards applications for execution of a decree which for no default of the applicant is dismissed for non-appearance, the mere ground that a fresh application for execution is competent should not be held to be a sufficient ground for holding that the Court cannot restore the application so dismissed in the exercise of its inherent power, when the interests of justice render such order necessary. A fresh application, though permitted by law, may be of no use, because it may be barred by limitation either under the Limitation Act or under section 48, Civil Procedure Code. It seems to us that the conflict of authority which exists on the questions arising in this case cannot

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1 (1894) L.R 22 I A 44: I.L R. 17 All 106: 5 M L.J 3 (P C).
7 (1913) L.R. 40 I.A. 151 · I.L.R 35 A 331 · 25 M.L.J. 148 (P.C).
9 (1921) 60 I.C. 720.

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but prove embarrassing to the litigants and the Courts, and that it is eminently desirable to have an authoritative ruling of a Full Bench on those questions. We therefore refer to a Full Bench the following questions:—

(1) Does Order 9 of the Civil Procedure Code apply to proceedings instituted under Rules 97 or 100 of Order 21?

(2) If the above question is answered in the negative, has the Court an inherent power to set aside the order of dismissal for default or an order passed *ex parte* against the respondent in those applications on sufficient cause being shown?

P. R. Srinivasa Aiyangar and *P. N. Appusami Aiyar* for petitioner.

S. Krishnaswami Aiyangar for respondent.

The Court expressed the following

Wallace, J.

OPINION. *Wallace, J.*—The two questions referred for the decision of the Full Bench are:

(1) Does Order 9 of the Civil Procedure Code apply to proceedings instituted under Rules 97 or 100 of Order 21?

(2) If the above question is answered in the negative, has the Court an inherent power to set aside the order of dismissal for default or an order passed *ex parte* against the respondent in those applications on sufficient cause being shown?

As to the first question, it is not contested that Order 9 does not apply to proceedings in execution except such as involve the determination of any question under section 47, in which case the orders thereon would amount to decrees (see *Subbiah Naicker* v. *Ramanathan Chettiar*[10] and *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[11]—decisions which have been followed in this Court in *Kaliakkal* v. *Palani Koundan*[3] and *Narayanan Chettiar* v. *Muthu Chettiar*[12]) and the argument at the bar has settled round the question whether proceedings under Rr. 97 and 100 of Order 21 are proceedings in execution at all. If they are proceedings in execution, it must also be admitted that there is a certain amount of overlapping in the Code, since cases might arise in which the proceedings would, on the face of them, come both under section 47 and under Rules 97 or 100; for example, cases of obstruction to delivery to the decree-holder under R. 97 by a judgment-debtor or some other party to the suit at his

3 (1925) 50 M.L.J. 200
10 (1914) I.L R 37 M 462: 26 M L.J. 189.
11 (1926) I.L.R. 53 C 781 (F B).
12 (1926) 51 M.L.J. 219.

instigation, or cases of some other party to the suit than the judgment-debtor being dispossessed under Rule 100 by the decree-holder or the auction-purchaser. Such cases will come both under section 47 and under Rules 97 or 100 and a different procedure would be adopted according to the category in which the Court placed the proceedings. Presumably in a case of such conflict, the main section 47 would prevail over the rules in the First Schedule, and if so, the orders passed in the proceedings would be decrees and Order 9 would apply. The fact of such overlapping is not to my mind a sufficient reason in itself on which to decide that orders under Rules 97 and 100 are not proceedings in execution.

The more general question is whether Order 9 applies to proceedings under Rules 97 and 100, and the answer to that really depends on the question whether such proceedings are proceedings in execution. There is no definition of "execution" in the Code and the only guide we have as to what the Legislature intended that word to cover is the contents of Order 21, which is headed "Execution of Decrees and Orders." Rules 97 and 100 come under that heading. *Prima facie* then the Legislature intended that proceedings under these rules should be regarded as included under the word "execution."

The respondent in the Civil Revision Petition from which this reference arises contends that execution comes to an end when the decree is satisfied, and that, when the decree is not for possession and the decree-holder has obtained his money by the Court-sale, it is improper to hold that any question of possession is a matter of the execution of the decree. He points out that a proceeding under Rule 97 or Rule 100 may not be at all between the parties to the suit; for example, it may be between a stranger auction-purchaser at the Court-sale and a stranger obstructing in one case or dispossessed in the other. He argues that it would be an anomaly to regard proceedings between two strangers to the suit as proceedings in execution of the decree in the suit. There is a great deal of force in this contention and it has weighed with the referring Judges, of whom I was one. Nevertheless, on further consideration, I am constrained to hold that it does not outweigh the inference from the inclusion of these proceedings in the order relating to the execution of decrees and orders. It does not seem reasonable to hold that the Legislature intended us to draw, so to speak, a dividing line after Rule 96 and say that all rules below this line do not relate to execution. In fact, as already indicated, they

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may in certain cases relate so closely to execution that they would properly fall to be decided under section 47. The Legislature was clearly not prepared to draw the distinction which the respondent seeks to make. For example, Rule 100 covers both the case of dispossession by the holder of a decree *for possession* and dispossession by an auction-purchaser of property sold in execution of a decree. The first dispossession is clearly in the course of execution of the decree for possession and there is no hint that the Legislature intended that the second dispossession should not equally be regarded as in execution. Otherwise, we will have to suppose that the Legislature intended us to draw the dividing line right through Rule 100 itself. Similarly Rule 97 covers the case of obstruction to the holder of a decree *for possession*, and the dividing line will have to be drawn through it also. Proceedings under Rules 97 and 100 follow as sequelae on the execution of the decree (using the word "execution" in its stricter sense) and on the Court sale, and the Legislature has enacted that such proceedings shall be regarded in law as part of the execution proceedings. There is really very little more to be said on this part of the case. It may be noted also, however, that an application under Rule 97 or Rule 100 must be put in to the executing Court, which may or may not be the Court before which the suit for possession would fall to be tried. This point has to be decided not so much on any general theory as to what execution may be or may include but on what the Legislature has laid down that it shall include.

If it is an execution proceeding, then section 141, on which the respondent relies, will not avail. It is argued that section 141 will apply to all execution proceedings which are not applications for execution, but I think it is a distinction without a difference. An application under the execution Order 21 will *ex facie* be an application for execution.. Besides this, the general trend of authority which has interpreted the leading Privy Council case on this section or rather on the old section 647 corresponding, namely, *Thakur Prasad* v. *Fakir-ullah*,[1] is against the idea that section 141 applies to execution proceedings at all. The Privy Council laid down that the old section 647 was intended to exclude from its purview the whole of the old Chapter XIX which is devoted to the procedure in execution. The old Chapter XIX is now Order 21, and both Rules 97 and 100 were in Chapter XIX as sections 328 and 332. With this

1 (1894) L.R. 22 I.A. 44: I.L.R. 17 All 106: 5 M.L.J. 3 (P.C).

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Privy Council decision before them, the framers of the amended Code made no substantial change in the general wording of section 647 beyond omitting the explanation, which was unnecessary in view of the Privy Council decision, and re-enacting section 647 as the present section 141.

Of the many cases and rulings cited at the bar, not many are of assistance. The state of the law in the Calcutta and Patna High Courts was for some time uncertain and rulings on either side may be and have been cited from both Courts. But the Full Bench in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* [11] has finally settled the law for the Calcutta High Court and that ruling is against the respondent. In Patna, *Sheonandan Chowdhury* v. *Debi Lal Chowdhury*[5] and *Satya Narayan Lall* v. *Govind Sahay*[6] are in favour of the respondent's view, but the Full Bench in *Bhubaneswar Prasad Singh* v. *Tilakdhari Lall*,[13] which interprets the Privy Council case as covering all proceedings in execution, is entirely against him. So that both the High Courts of Patna and Calcutta have decided against the respondent's view.

It is therefore obvious that section 141 does not apply to such proceedings under Order 21 as are not also proceedings under section 47. Therefore on the first question the answer is that Order 9 does not apply to such proceedings under Rule 97 or 100 as do not also fall within section 47.

As to the second question, that is, the Court's inherent power to set aside the order, the respondent urges that the Court must have inherent power to set aside its own order of dismissal for default. The contention is that, where the Court is not restricted by the sections of the Code, it has inherent power to do anything in the name of justice. Such a contention in substance is that the Civil Procedure Code is not a Code conferring powers on a Court but is a Code restricting and delimiting its unlimited powers. To such a view we cannot subscribe. It would allow the Court to do any act whatever provided there was no provision in law directly prohibiting that act being done and would in effect put the Court above the written law altogether. The ordinary Civil Court derives its powers from the Civil Procedure Code and other statutes and possesses only such powers as are therein conferred. The inherent power, so far as it exists, is itself a matter of statute (see

5 (1923) I.L R. 2 Pat. 372.
6 (1918) 3 Pat L.J. 250
11. (1926) I.L.R. 53 C 781 (F.B.).
13. (1919) 4 Pat. L.J. 135 (F.B).

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section 151 of the Civil Procedure Code). It has been held by a Full Bench in *Neelaveni* v. *Narayana Reddi*[14] that, in the case of setting aside *ex parte* decrees, the Court has no inherent power and can only act under Order 9, Rule 13. It would be surprising if, in the matter of execution, the Court has inherent powers which it does not possess in the case of a suit. The resort to inherent powers may be justified in a case of gross injustice where the party has no other remedy. But here the party has his remedy by way of suit. This is the principle which has been adopted in several cases in this Court. See *Kaliakkal* v. *Palani Koundan*,[3] *Narayanan Chettiar* v. *Muthu Chettiar*[12] and *Vemareddi Ramaraghavareddi* v. *Rajah of Venkatagiri*.[15] In *Ramappa Chettiar* v. *Ekambara Padayachi*[8] a single Judge of this Court has ruled that a Court has inherent power to restore a claim petition under Rule 58 dismissed for default but no authority has been cited or dealt with on the point. On full consideration and giving weight to the matters set out in the order of reference, I think we should not be justified in laying down any general principle that an ordinary Civil Court has inherent power to set aside its own order and to interfere in any case in which it thinks a failure of justice has occurred when the aggrieved party has another remedy by which it can be set aside, even though the remedy is not as summary or as cheap. As a matter of fact the respondent might have come forward at the earlier stages of the execution proceedings, for example, when the property was attached, and did not choose to do so but waited until the final proceedings for delivery were going on, and then failed to appear and prosecute his case.

I therefore would answer both the points referred to the Full Bench in the negative.

Beasley, J.—I agree.

Madhavan Nair, J.—I agree.

Wallace, J.—This opinion will be sent back to the Division Bench of which I shall be a member. The matter of costs will be decided then.

N.S. *Reference answered in the negative.*

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3. (1925) 50 M.L.J. 200.
8 (1924) 47 M.L.J. 13.
12 (1926) 51 M.L.J. 219
14 (1919) I.L R. 43 M 94· 37 M.L.J. 599 (F B.).
15. (1926) 52 M.L.J. 123.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI.

Akarappu Venkanna and others .. *Plaintiffs**

v.

Akarappu Chennayya and others .. *Defendants.*

Venkanna *v.* Chennayya.

Provincial Insolvency Act (V of 1920)—District Court of Secunderabad—Foreign Court or Court in British India—Adjudication by that Court of a person as insolvent—If puts an end to execution proceedings against him in British India.

The District Court of Secunderabad is a foreign Court and not a Court in British India for the purpose of the Provincial Insolvency Act and, consequently, the adjudication of a person as insolvent by that Court does not put an end to all execution proceedings against him in British India.

S. Doraiswami Aiyar for *A. K. Ramachandra Aiyar* for plaintiff decree-holders in C.S. No. 510 of 1926.

V. V. Srinivasa Aiyangar for 1st defendant in C.S. No. 420 of 1922.

T. Ramachandra Rao for *A. Venkatasubba Rao* for Official Receiver.

T. G. Raghavachari for plaintiff in C.S. No. 420 of 1922.

V. Radhakrishnayya for 2nd defendant in C.S. No. 420 of 1922.

O. P. Srinivasan for 4th defendant in C.S. No. 420 of 1922.

The Court delivered the following

JUDGMENT.—These applications arise out of a preliminary decree passed in C. S. No. 420 of 1922, a compromise subsequent to the preliminary decree between the parties to the suit, and an order by me on an application to confirm the compromise.

The facts are shortly these: C.S. No. 420 of 1922 was filed in this Court for partition of the joint family properties belonging to the Akarappu family. A preliminary decree was passed on the 5th December, 1922. On the 25th February, 1926, the decree-holder in C.S. No. 510 of 1926 on the file of the Bombay High Court, who had got a decree against the plaintiffs in C.S. No. 420 of 1922, applied for an attachment of the preliminary decree. The decree of the Bombay High Court is dated 15th June, 1926, and is for Rs. 53,230-9-0. The execution application was transferred to this Court by an order, dated 22nd Nov-

*C.S. No. 420 of 1922, C. S. No. 510 of 1926 on the file of the Bombay High Court and C.S. No. 401 of 1927. 23rd April, 1929.

ember, 1926. On the 20th December, 1926, execution was applied for in this Court by the decree-holder in the Bombay suit and the preliminary decree of this Court was attached. On the 5th July, 1928, a compromise was entered into between the plaintiffs and the defendants in C.S. No. 420 of 1922. which is embodied in a stamped document, dated 10th August, 1928. An application was made in C.S. No. 420 of 1922 for a decree in terms of the compromise, and it came on before me on the 21st September, 1928. The attaching creditor in C.S. No. 510 of 1926 (Bombay High Court) appeared before me and objected to the compromise being made a decree as he had attached the preliminary decree. I went through the whole matter in my order, dated 21st September, 1928, and stated that a final decree would not be passed unless the amount payable to the attaching creditor was paid into it and dealt with in the manner which I directed. As there is some question as to the nature of my order, I may state at once that what I have done and what the order says is that, if the parties want me to pass a final decree in terms of the compromise, that can only be done on the condition that the attaching creditor who opposes the application is paid, and in the last portion of my order this is what I say: "That the further hearing of this application for passing a final decree herein in terms of the said compromise do stand adjourned until after the defendants 1 and 2 herein pay the said amount into Court as directed in paragraph 1 above." This amount was not paid as directed. There was an appeal filed against the order and stay obtained, which stay was subsequently discharged, but the appeal is still pending. The contention for the appellants there seems to be that I should have passed an unconditional order irrespective of the attachment and any rights of the Bombay creditor thereon. That is a matter which the Appellate Court has to dispose of. After the order which I passed the plaintiff in C.S. No. 420 of 1922 was adjudicated an insolvent on the 15th October, 1928, by the District Judge of Secunderabad. On the 28th of August, 1928, the Master made an order continuing the attachment, and the attachment is still pending.

There are three applications filed by the Bombay attaching-creditor. The first application contains a number of alternative prayers. Prayer (*a*) is to direct the defendants in C.S. No. 420 of 1922 to pay into Court a sum of Rs. 63,407-4-0; prayer (*b*) in the alternative, why leave should not be granted to the applicant to execute the order, dated the 21st of September,

1928, passed on the application of the defendants in C.S. No. 420 of 1922; prayer (*c*) in the alternative, why the compromise entered into between the plaintiffs and the defendants in C.S. No. 420 of 1922 should not be made a decree of Court and why liberty should not be granted to the applicant to execute the said decree; prayer (*d*) in the alternative, why leave should not be given to the applicant to execute the terms contained in paragraph 8 of the preliminary decree. There are two other applications for continuing the attachment.

I shall deal with the first application and the alternative clauses therein contained. It seems to me to be clear from the order which I passed on the application to pass a final decree on the 21st September, 1928, which I have already set out, that no decree has been passed in terms of the compromise. All that I said was that, if certain payments were made as directed by me which would remove the obstacle raised by the attachment, I would then pass a final decree in terms of the compromise because, if the attaching-creditor is paid, there will be no question of objection to the passing of the final decree. That sum has not been paid and, therefore, matters stand thus: There has been a preliminary decree passed by the Court; there is no final decree; an application to pass a final decree was made and granted on certain terms which terms have not been complied with and there is an appeal from my order which is pending in the Appellate Court. Under these circumstances, it seems to me difficult to see how I can pass orders on the first three alternative reliefs claimed. They can only arise on the footing that there has been a final decree passed on the compromise.

So far as the attachment is concerned, the question is whether I should continue the attachment, and here I have to deal with the contention of the Official Receiver of Secunderabad, who appears by Mr. Ramachandra Rao. He has asked to be made a party to these proceedings and I directed him to be made a party as I found it difficult to see how I could dispose of this matter without hearing the objections which the Official Receiver had. His contention shortly is that under the terms of the Provincial Insolvency Act which is extended to Secunderabad and governs the District Court of Secunderabad, the plaintiff in C.S. No. 420 of 1922 having been adjudicated an insolvent, the attachment by the plaintiff in the Bombay Court of the decree of this Court fails. For the plaintiff in the Bombay Court it is contended that the Secunderabad Court is a foreign Court and that the effect of an adjudication in Secun-

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derabad does not affect the attachment of any rights in British India. So far as the Secunderabad District Court is concerned, there can be little doubt that the territories within the jurisdiction of the Secunderabad District Court are not British India; these are territories which have been ceded by the Nizam to the British Government under treaty. I may in this connection refer to Lee Warner's "Protected Princes of India," Chap. XII, pages 331 to 342 as to the way in which Secunderabad came to be under British control. The District Court has been established in Secunderabad under the Foreign Jurisdiction Act, 1890, of the Imperial Parliament. Under this Act, notifications have been issued by the Order of Council, dated 11th June, 1902, and 4th February, 1904, which are to be found in Macpherson's "British Enactments in Force in Native States," Vol. VI, page 23, and Vol. I, page 252 respectively, and the District Court of Secunderabad constituted. That Secunderabad is foreign territory is clear. I may in this connection refer to *Hossain Ali Mirza* v. *Abid Ali Mirza*[1] Reference has been made to section 2, clause (5), section 10 and sections 43 to 45 of the Code of Civil Procedure, and then it is argued from those sections that the Secunderabad Court is not a foreign Court. But, as pointed out in *Vulcan Iron Works* v. *Bishumbhur Prosad*,[2] the fact that the Code for certain purposes defines a 'Foreign Court' would not make that definition applicable in the case of all enactments. There is nothing in the Provincial Insolvency Act as regards the definition of a 'Foreign Court.' No doubt, for purposes of execution or sending processes, the Governor-General in Council has made provision in the Civil Procedure Code, but it is only for those purposes. So far as insolvency is concerned, there is nothing in the Provincial Insolvency Act which says that the Court in Secunderabad which is out of British India is a Court in British India. I do not think the Imperial Legislature has any power to legislate with regard to territories outside British India. 'British India' is defined both in the General Clauses Act of 1868 and the General Clauses Act of 1897. It seems to me that the very notifications which constituted the District Court of Secunderabad negative the idea that it is a Court in British India. These are Courts established outside British India in pursuance of powers conferred by the Foreign Jurisdiction Act, but these Courts, though constituted by the Governor-General in Council, are really Courts in Native States. I may refer in this connection to *The Secretary of State for Foreign Affairs* v. *Charles-*

1 (1893) I.L.R. 21 C 177 2. (1908) I.L.R. 36 C. 233.

worth, Pilling & Co.[3] and *Carew, Ex parte.*[4] I am of opinion that the District Court of Secunderabad is a foreign Court.

The position, therefore, is that the plaintiff in C.S. No. 420 of 1922 was adjudicated a bankrupt in a foreign Court. I do not think that such adjudication will put an end to all execution proceedings against the person adjudicated there, in British India. So far as British India is concerned, the Official Assignee takes the properties subject to all the equities. I may in this connection refer to *Ex parte Holthausen. In re Scheibler*[5] and *Galbraith* v. *Grimshaw.*[6] It is stated that there is some difference as regards the effect of attachments in British India and English Courts, but I do not think that that makes much difference, the principle on which the cases are decided being that the trustee in bankruptcy or Official Receiver in a foreign Court cannot take advantage of the provisions of law applicable to Courts in British India as regards the ante-dating. I am, therefore, unable to agree with the contention of the Official Receiver of Secunderabad that, because of the insolvency in Secunderabad, I ought not to continue the attachment and grant the prayers in the two applications continuing the attachment.

I may state that, as regards the execution of the preliminary decree, Mr. Doraiswami Aiyar for the plaintiff wants only general leave to execute the preliminary decree and says that he does not press for execution of clause (8), which is specifically stated in the summons. The order, therefore, on these applications is that the attachment of the preliminary decree will continue until further orders of this Court and that leave is given to the Bombay decree-holder to execute the preliminary decree. I decide nothing further as to the reliefs he may claim in that execution or the form which the application may take.

As regards the costs of these applications, I direct the taxed costs of all parties to come out of the moneys which are paid into Court under the preliminary decree; the Official Receiver of Secunderabad will be at liberty to take his costs out of any estate which may be in Secunderabad.

N.S. *Attachment continued.*

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3 (1901) A.C. 373
4. (1897) A.C. 719
5 (1874) 9 Ch App 722
6. (1910) A.C. 508.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Anumanchi Ramanayya .. *Appellant** (*2nd respondent in S.A. No.* 1506 *of* 1928)

v.

Thubati Kotayya and another .. *Respondents* (*Appellant and 1st respondent in do.*).

Ramanayya v. Kotayya.

Letters Patent, cl. (15) (*as amended*)—*Judgment of a single Judge of the High Court in Second Appeal—Refusal by that Judge to grant leave to appeal from that judgment—Order of refusal, if appealable*

No appeal lies, under clause (15) of the Letters Patent, against the refusal of a single Judge of the High Court to grant leave to appeal from the judgment passed by him in a Second Appeal

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Venkatasubba Rao, dated 27th February, 1929, and passed in the motion of Mr. Ch. Raghava Rao, Advocate for the appellant herein, refusing to grant leave to file a Letters Patent Appeal against the judgment delivered in Second Appeal No. 1506 of 1928 on the file of the High Court (A S. No 261 of 1928 on the file of the District Court of Guntur—O.S. No. 605 of 1928 on the file of the Court of the District Munsif of Narasaraopet).

Ch. Raghava Rao for appellant.

P Venkataramana Rao, A. Lakshmayya and *D. Krishnaswami* for respondents.

The judgment of the Court was delivered by

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—This is an appeal purporting to have been preferred under section 15 of the Letters Patent against the refusal by a learned Judge of this Court of leave to appeal from the judgment passed by him in a Second Appeal.

A preliminary objection is taken by Mr. Venkataramana Rao, the learned Advocate who appeared for the respondent, that no appeal lies from such orders of refusal of leave to appeal.

Clause (15) of the Letters Patent of this High Court was recently amended on 3rd November, 1927 and on 12th December, 1928. The effect of these amendments is to declare that no appeal shall lie to the High Court from the judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court (and

*L.P.A. No. 38 of 1929. 30th April, 1929.

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not being an order made in the exercise of a revisional jurisdiction or in the exercise of criminal jurisdiction) of one Judge of the High Court, or of one Judge of any Division Court pursuant to section 108 of the Government of India Act, made on or after 1st February, 1929, unless the Judge who passed the judgment declares that the case is a fit one for appeal. The second appeal in question was heard by the learned Judge after 1st February, 1929, and the learned Judge when moved by the present appellant has declined to grant leave to appeal under clause (15) of the Letters Patent. The appellant has preferred this appeal against the said refusal by the learned Judge to grant leave to appeal. The question is whether this appeal is maintainable.

As remarked by the Privy Council in *Minakshi Naidu* v. *Subramanya Sastri*,[1] "it is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law or equivalent authority". The Privy Council made a similar observation in the case reported in *Mayor, etc., of Montreal* v. *Brown and Springle*[2] "The rule of law in this country is that an appeal does not lie unless given by express legislative enactment." See also *Lane* v. *Esdaile*[3] *per* Lord Halsbury, L.C. That being so, the appellant must point out the provision of law under which he claims this right of appeal. The rule would apply with equal, if not with greater force, when it is sought to prefer appeal against the decision of one learned Judge of a Court to a Division Court of that Court. Under section 108 of the Government of India Act, the Chief Justice shall determine what Judge in each case is to sit alone and what Judges of the Court are to constitute the several Division Courts. The decision passed by such Judge or Division Court would be final unless a right of appeal be specifically given. Clause (15) of the Letters Patent is the only provision which has been brought to our notice, and it is under that clause that the present Letters Patent Appeal has been preferred. On a reading of clause (15) as amended, it is clear to us that no appeal would lie to the High Court from a judgment passed by one Judge of the High Court in second appeal after 1st February, 1929. No further appeal to the High Court is available except where the Judge who passed the judgment declares that the case is a fit one for appeal.

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1. (1887) L.R. 14 I A. 160: I.L.R. 11 M. 26 (P.C.).
2. (1876) 2 A.C. 168 at 184.
3. (1891) A.C. 210 at 211.

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When a right of appeal is given subject to any condition, it is clear that the said condition should be strictly complied with before the right of appeal could be taken advantage of. As stated in Maxwell's Interpretation of Statutes, Ch. XII, section 3, "Where it was provided that no appeal should be entertained unless certain rules were complied with, the neglect of the statutory requisites would obviously be fatal".

Mr. Raghava Rao, the learned Advocate for the appellant, argues, however, that what clause (15) prohibits is only an appeal from the judgment of one learned Judge on the merits of a second appeal, and that the clause does not prohibit a right of appeal from the refusal of one learned Judge to declare that the case is a fit one for appeal; in the case of such refusal, he argues, there is right of appeal, and if the Appellate Bench also agrees with the learned Judge on the question that the case is not a fit one for appeal, then only is there an end of right of appeal. In other words, if we understood his contention correctly, he argues that while there is no right of appeal against the judgment passed on the merits in the second appeal, there is a right of appeal from the refusal in such a case to grant leave and the Appellate Bench should decide, as best as it could, whether the refusal to grant leave to appeal was right or not. He did not hide from us the fact that the Appellate Bench may have for this purpose to go into the merits of the case itself to such extent as it thought necessary.

He also argued that the question now is not in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, but that it is with reference to a judgment passed by the High Court itself, and that the restrictions referred to in clause (15) do not apply to a judgment of the High Court.

We are clear that the arguments of the learned Advocate for the appellant are untenable and that the present appeal is not maintainable.

The practice of providing a right of appeal subject to conditions, though comparatively new to India, has been prevailing for a long time in England; sometimes leave of the Judge who decided the case or of the Court is made the condition precedent for the entertainment of an appeal; in other cases leave of either a Judge or the Court on the one hand or of the Court of Appeal on the other is made a condition precedent. An instance of the former is furnished by section 45 of the Judicature Act of 1873, and an instance of the latter is furnished by the Judi-

cature Act of 1894, section 1 (5). In India we have got an instance furnished by section 75, clause (3) of the Provincial Insolvency Act where a right of appeal to the High Court is given on obtaining leave of the District Court or of the High Court in respect of certain orders mentioned therein.

English Courts had to consider the very question raised in this appeal before us, namely, whether there is any right of appeal from the refusal of a Judge to grant leave to appeal.

In *Kay* v. *Briggs*[4] the Court of Appeal held:

"Where a Divisional Court has refused special leave to appeal, under section 45 of the Judicature Act, 1873, from their decision given in an appeal from a County Court, the Court of Appeal has no jurisdiction to hear an appeal from such refusal."

The following passage occurs in the judgment of Lord Esher, M.R.:—

"If this Court could overrule the discretion given by that section to Divisional Courts, the practical effect would be to allow an appeal here in every case, because the facts of each case would be brought before us in order to enable us to decide whether or not we ought to overrule that discretion. I think that the real meaning of section 45 is to confine the power to give leave to appeal absolutely to the Divisional Courts I am of opinion, therefore, that we have no jurisdiction to interfere with the exercise of their discretion"

Fry, L.J., observes as follows in the same case:—

"If an appeal from the refusal of the Divisional Court to grant leave to appeal could be brought to this Court, our order would not satisfy the only contingency upon which the section provides that the decision of the Divisional Court shall not be final, because special leave to appeal would be given, not by the Divisional Court, but by this Court. The decision of the Divisional Court would cease to be final, although the contingency remained unsatisfied."

In *Lane* v. *Esdaile*[3] the House of Lords decided that

"No appeal lies to this House from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court.. . Such a refusal is not an order or judgment of the Court of Appeal within the meaning of section 3 of the Appellate Jurisdiction Act, 1876."

At page 215 Lord Herschell observed as follows:—

"If the contention of the appellants were well founded I think it would follow that under this section 45 (of the Judicature Act of 1873) there could be an appeal to the Court of Appeal from a refusal by the Divisional Court, and an appeal again from the Court of Appeal to this House, so that every County Court case might be brought up to this House upon the question whether an appeal should be allowed or not."

Lord Field remarked at page 216:

"It seems to me that if your Lordships were to say now 'We will give leave' and the Court of Appeal must enforce that, it would be

3. (1891) A.C. 210.

4. (1889) 22 Q.B.D. 343.

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imposing upon them the duty of giving a leave, as their leave, which they in their own judgment think ought not to be given."

We may refer to one more case, *Ex parte Stevenson*,[5] where

"A Judge at Chambers having refused to grant leave under Sch. II, clause (26) (*a*) of the Housing of the Working Classes Act, 1890, the Divisional Court held that no appeal lay to them from his decision. The Court of Appeal held that no appeal lay."

Lord Esher, M.R., at page 611 laid down the law in the following words:

"I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. . . . The very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity, and the provision is made of no effect. If the contention for the claimant be correct, it would follow that the case might be taken from one Court to another till it reached the House of Lords on the question whether there should be leave to appeal. That cannot be so. For these reasons, I think the appeal must be dismissed."

Fry, L.J., gives some other reasons in support of the same position at page 612:

"Is the order granting or refusing leave to appeal, subject to appeal? In my opinion it is not. I do not come to that conclusion on the ground that the word 'order' is not properly applicable to it; but from the nature of the thing and the object of the legislature in imposing this fetter on appeals. The object clearly was to prevent frivolous and needless appeals. If, from an order refusing leave to appeal, there may be an appeal, the result will be that, in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal......It appears to me that that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals. Therefore, from the very nature of the thing the decision of the Court which has the power of giving leave to appeal is, in my opinion, final."

It is perhaps useful to quote one or two sentences from the judgment of Lopes, L.J., at page 612:

"Where an appeal is given that is made subject to the leave of the Court or a Judge, or any other legal authority, I think that the granting or refusal of leave by such Court, or Judge, or other legal authority, is final and unappealable The object of making appeals subject to leave is to prevent unnecessary and frivolous appeals. If an appeal were allowed from the granting or refusal of leave to appeal, the result would be that, instead of checking appeals, they might be multiplied to a most mischievous extent; for an appeal from the granting or refusal of leave might be carried from the Divisional Court to this Court, and from this Court to the House of Lords For these reasons I think that the preliminary objection must prevail."

5. (1892) 1 Q.B.D. 609.

Ramanayya v. Lotayya.

Ananta-krishna Aiyar, J.

It was argued that the order passed by the learned Judge refusing leave to appeal in this case should be taken to be a judgment within the meaning of the Letters Patent, and in support of that position certain decisions of this Court were cited to us (*Tuljaram Row* v *Alagappa Chettiar,*[6] *Sonachalam Pillai* v. *Kumaravelu Chettiar,*[7] *The Official Assignee of Madras* v. *Ramalingappa*[8] and *Maharajah of Pittapuram* v. *Rama Rao*[9]). Having regard to the decision of the House of Lords in *Lane* v. *Esdaile,*[3] already referred to, it is to say the least, very doubtful whether such an order refusing leave could be said to be a 'judgment' for the purpose now under consideration, within the meaning of clause (15) of the Letters Patent. But we are clear, reading clause (15) as a whole, that the intention of the Legislature is that a judgment passed by a single Judge in a second appeal after 1st February, 1929, is final and not appealable, and that an appeal could be entertained against the said judgment only if the Judge who decided the second appeal granted leave to appeal. This, to our mind, is clear from the provisions of clause (15) of the Letters Patent. The learned Judge having in this case declined to grant leave to appeal, the judgment in second appeal is final. Whether the order refusing leave to appeal be a 'judgment' or not, it is clear that no leave to appeal that might be granted by a Division Court would satisfy the requirements of the clause which provides that an appeal would lie only when the Judge who heard the second appeal grants leave to appeal. The English cases fully support the above position.

A decision of this Court reported in *Madhava Aiyar* v. *Muthia Chettiar,*[10] referred to by the learned Advocate for the respondents, supports this view, though we think that the grounds for holding that no appeal lies in the present case are probably stronger than the grounds mentioned in the case in *Madhava Aiyar* v. *Muthia Chettiar.*[10]

For the above reasons we are clear that no appeal lies from the refusal of leave to appeal by a learned Judge from a judgment passed by him in a second appeal after 1st February, 1929, under the amended clause (15) of the Letters Patent, and we dismiss the appeal with costs of the 1st respondent (plaintiff).

N.S. *Appeal dismissed.*

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3. (1891) A.C. 210.
6 (1910) I.L.R. 35 M 1: 21 M L J. 1 (F B.).
7. (1923) I.L.R. 47 M. 316: 46 M.L.J. 138.
8. (1925) I L R. 49 M 539: 50 M.L.J. 361.
9 (1927) I.L.R. 50 M 770; 53 M.L.J. 329.
10 (1916) 5 L W. 168.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Babu *alias* Govinddoss Krishnadoss .. *Plaintiff**

v.

Gokuldoss Govardhandoss and others .. *Defendants.*

Babu *alias* Govinddoss Krishnadoss *v.* Gokuldoss Govardhandoss.

Partnership—Partner of—Death of a—Surviving partner's rights and duties on—Debts contracted and alienations made by surviving partner—Binding nature of, on representatives of deceased partner—Conditions—English Law—Law under Contract Act.

On the death of a partner of a firm, leaving an infant representative, it is the duty of the surviving partner to wind up the dissolved partnership and for that purpose, if necessary, he is entitled to carry on and continue the business. He is under a duty to realise the assets, fulfil the existing obligations, pay off the debts and ascertain the extent of the surplus property remaining, that becomes divisible between the partners The infant representative of the deceased partner and the surviving partner would be the joint owners of that residue, and the proportion of their shares would depend upon the state of the account between the partners *inter se*

Under the Indian Law, as under the English, the surviving partner has thus a right to dispose of the properties of the dissolved firm for purposes connected with the winding up of that firm; but if the alienation is not for such a purpose, the purchaser acquires, nevertheless, an indefeasible title, provided there are circumstances justifying a reasonable belief that the act was done in furtherance of the winding up; otherwise, he is not protected. Therefore, if the case of a secured creditor does not fall within this rule, his right must give way to the superior claim of the deceased partner's representative. *A fortiori*, the share of the deceased partner is not liable to answer for the sums due to unsecured creditors of the new firm. A party dealing with the surviving partner cannot rely upon the latter's apparent authority of surviving partner, if that party did not profess to deal with him as such partner.

S. Duraiswami Aiyar and *V. Balaraman* for plaintiff.

V. Radhakrishnayya and *K. Rajah Aiyar* for 3rd defendant.

Sir C. P. Ramaswami Aiyar instructed by *Messrs. King and Partridge* for 6th, 8th, 9th and 16th defendants.

A. Krishnaswami Aiyar and *M. Subbaraya Aiyar* for 7th defendant.

S. Jagadeesa Aiyar for 11th to 15th defendants.

The Court delivered the following

JUDGMENT.—By my preliminary judgment, dated the 2nd May, 1928,* I declared that the plaintiff was entitled to have an account taken of the affairs of the partnership as on the date of the death of his father, namely, the 13th August, 1908. After

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*C.S. No. 622 of 1923 30th April, 1929.

*See 55 M.L.J. Reports 132.

making that declaration, without forthwith referring the case to the Official Referee, I granted an adjournment at the request of the 6th defendant's counsel, who wanted time to consider his position in regard to his filing an appeal from my judgment. I understand that no appeal has been filed and I am now asked to deal with certain questions of accountability arising between the parties. The plaintiff's right would arise only if it be found that some amount is due to him; but all parties have desired me to first deal with these questions even before the accounts are taken. That means, of course, that the parties believe that the accounts, if gone into, will disclose that a substantial sum is due to the plaintiff. It is on this hypothesis that I am now dealing with the questions raised.

For ready reference, I reproduce a part of the pedigree set forth in my preliminary judgment.

Muralidas, died 24th April, 1907. Married Yasodabai or Jessubai or Jessu.

- Putlibai *alias* Nani or Nanu. Married Laldas.
  - Jayakrishna, died young
- Krishnadoss. Born 16th May, 1884. Married Radhabai, 4th defendant.
  - Babu *alias* Govindas. Born 18th November, 1907 Plaintiff.

Govardhandas, died 26th September, 1909. Married Kammubai, D. 5. Died January, 1926.

- Gokuldas, 1st defendant. Born 6th April, 1885. Married Gangabai
- Dwarakadas, 2nd defendant. Born 12th November, 1891. Died 14th January, 1925. Md. Jamnabai.
  - Ramdas, 3rd defendant. Born 9th August, 1914.

I have held that the partnership consisted of Muralidas, Govardhandas, Krishnadas and Gokuldas. Murali died in 1907, Krishnadas, the plaintiff's father, in 1908 and Govardhan in 1909. Gokuldas, the 1st defendant, became the surviving partner, who, without winding up the affairs of the dissolved firm, continued the business employing its assets. This has given rise to the questions that have now been argued before me.

There can be no doubt as regards the true legal position of Gokuldas as the surviving partner of the firm. The plaintiff was, at his father's death, an infant about nine months old and, when Govardhan died, had not completed his second year. On him devolved the interest of Krishnadas in the partnership. It was the duty of Gokul to have wound up the dissolved partnership and for that purpose, if necessary, he was entitled to carry on and con-

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tinue the business. He was under a duty to realize the assets, fulfil the existing obligations, pay off the debts and ascertain the extent of the surplus property remaining, that became divisible between the partners. The plaintiff and Gokul would be the joint owners of that residue and in what shares they owned it would depend upon the state of the account between the partners *inter se*. This is the course clearly indicated by the law and if this course had been followed, rights of third parties would not have come into existence conflicting with the plaintiff's rights and the surplus to the extent of his share would have been at his disposal. But, instead of following this course, Gokul (this is not disputed) continued and carried on the business—not with a view to wind it up and bring it to a speedy close—but conducted the trade as an ordinary trader would, incurring new obligations and entering into fresh transactions. An extensive business was carried on in this way for several years till Gokuldas failed in trade and was adjudged an insolvent in 1924. The assets of the partnership at the death of Krishnadas consisted *inter alia* of many items of valuable immoveable property worth some lakhs and Gokuldas, it is alleged, mortgaged several of them for debts borrowed in the course of the trade which he subsequently carried on for his own benefit. For the plaintiff it is contended, that he is entitled to proceed against what was at the dissolution, the property of the firm and recover out of it, his share, when that is determined. The contention put forward is, that, under the law, the partnership property has first to be applied in discharge of the firm's debts and when that is done and the surplus is ascertained, each of the partners has a right, which cannot be defeated, to receive his share out of the surplus assets. The plaintiff's position may be thus stated: as the surviving partner Gokul had certain powers; those powers were in a sense plenary, that is to say, he could validly sell or mortgage the properties of the dissolved firm, provided (the proviso is important) the acts done were in the course of, or for the winding up of, the partnership. The plaintiff concedes that this rule is qualified to this extent, namely, that if third parties dealt with Gokul in the reasonable belief that a given sale or mortgage was necessary for the proper winding up, the title such third parties acquired would not be defeated, although in point of fact, there was absence of necessity, or the money raised was misapplied. The plaintiff contends that, if, after paying off partnership debts *and after making due provision in favour of transactions of the kind mentioned above*, there remains a surplus, he is entitled as the representative of the deceas-

ed partner, to proceed against that surplus, for recovering in specie, what may be found to be his share. To this, the answer of the Official Assignee is, that what is due to the plaintiff is a debt pure and simple due from Gokul, that the former can recover that debt out of the estate of Gokul, just in the same manner as any other creditor can. In other words, he contends that the plaintiff has no special rights over and above any ordinary creditor of Gokul and that he (the plaintiff) ranking as such creditor, is at liberty, if he chooses, to prove his debt in insolvency and receive a dividend out of the bankrupt's estate. This is the contention put forward on behalf of unsecured creditors by the Official Assignee. Then as regards secured creditors, they maintain that in law, the right of the surviving partner to deal with partnership property is, that of an unqualified owner and whatever right the plaintiff may have against Gokul, that right cannot defeat the interest created in the property by the latter in their favour. These are the points on which I am now asked to give my decision. This part of the case has been fully argued by Mr. S. Duraiswami Aiyar for the plaintiff and by Sir C. P. Ramaswami Aiyar, as well as the Advocate-General, for the defence. The contentions seem, in my opinion, to involve points which are fairly simple.

At this point, I must mention that several cases were posted along with this in the Cause List, some of them being suits filed by certain secured creditors of Gokuldas. An application was made to me that they should be impleaded as parties to this action. On that application, I made on the 28th February, 1929 the following

ORDER.—"These various persons desire to be added as parties to C.S. No. 622 of 1923 which, I shall call, the main suit.

Maharaja of Pittapuram, Plaintiff in C.S. No. 229 of 1924.

Dewan Bahadur Govinddoss Chaturbujadoss, Plaintiff in C.S. No. 434 of 1923.

Best and Company, Ltd., Plaintiff in C.S. No. 85 of 1924.

Potti Narayanaswamy Chetty by legal representatives and Potti Ethirajulu Chetty, Plaintiffs 1 to 7 in C.S. No. 50 of 1927.

Messrs Chathurbujadoss Khusaldoss & Sons, 1st defendant in C.S. No. 691 of 1928.

Application to this effect is made by their respective counsel Sir C. P. Ramaswami Aiyar, Mr. Subbaraya Aiyar and Mr. S. Jagadeesa Aiyar. Certain important issues are common to the

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main suit and the several suits to which they are already parties. The applicants urge that they are interested in the account that has to be taken as a consequence of the preliminary judgment passed in the main suit. Mr. Duraiswami Aiyar does not concede this position, but in any event, it is emmently desirable that that account should be taken in the presence of the parties whom it affects. The plaintiff in the main suit, by his counsel, Mr. S. Duraiswami Aiyar and the other parties to that suit agree to the application being granted. I therefore make this order by consent. I direct these various persons to be made parties to C.S. No. 622 of 1923 on the terms, namely, that they shall be bound by all that has so far transpired in that suit, and that, while they shall be at liberty to file separate statements of objections before the Official Referee, they shall be represented (their interests being identical) by one practitioner or one set of practitioners at that enquiry and that they shall be so represented by the legal adviser or advisers of the firm of Khusaldas & Sons, liberty being reserved to the parties to apply, by reason of any change of circumstances, that the practitioner or practitioners, who shall appear before the Official Referee, shall be of a party, other than Khusaldas & Sons. The question of costs is reserved."

I shall now proceed to deal with the questions raised. I have set forth fully the nature of the right which the plaintiff claims. It is impossible to accurately describe it in a single statement, but, in text-books and judgments, the expression "partner's lien" is used to describe this right It must be borne in mind that this is merely a convenient mode of referring to the right and that the word "lien" in this phrase is not used in its ordinary technical sense. To ignore this, must necessarily lead to confusion of thought. Those that use the expression are careful to point out, that an outgoing partner enjoys no such right as a lien, in the strict sense of the term. Lindley (to take an example) is conscious of the fact that the phrase is liable to mislead, for he refers to it as "the right, lien, *quasi*-lien, or whatever else it may be called."—Lindley on *Partnership*, 9th Ed., p. 438.

Similarly Pollock and Mulla, speaking of this right, refer to it as belonging "to the class of equitable not possessory liens" and further add "*commonly called* 'partner's lien'." (*See* commentaries under section 262, Indian Contract Act).

I refer to this fact at the outset, because much of the criticism levelled against the plaintiff's case has proceeded and

wrongly on the footing that what he claims is to enforce a lien, that is, a specific charge upon partnership property.

The law of this subject is thus set forth by Lindley:

"In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm, and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm."

"The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy."

"To hold, however, that this lien could be enforced against persons purchasing partnership property would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that share subject to the liens of the other partners, person who *bona fide* purchases from one partner specific property belonging to the firm acquires a good title to such property, whatever liens the other partners might have had on them prior to their sale."

These passages show, how the right loosely described as "partner's lien," is conditioned by the undoubted power which a surviving partner possesses, to give a valid title to a purchaser in good faith, of any specific property belonging to the firm. The contentions urged against the plaintiff are, first, that the amount due to him is in the nature of a simple debt and, secondly, that one who purchases from a surviving partner acquires a good title whether the transaction is *bona fide* or not. In my opinion, both these contentions are clearly untenable. On this point, as I shall show presently, there is no difference between the English and the Indian Law. Section 39 of the Partnership Act, 1890, enacts, that on the dissolution of a partnership, every partner is entitled, first, to have the partnership property applied in payment of the partnership debts and, next, to have the surplus assets, then remaining, applied in payment of what may be due to the partners, on an account being taken. This section in effect prescribes the mode of dealing with the assets of a dissolved firm. The debts due to its creditors must be first paid out; when that is done, the section declares, the outgoing and the surviving partners own the surplus as their property. Each of them, then, is a part-owner of that surplus, the extent of his interest depending on the state of the account between the partners *inter se*. It is from this joint ownership that the retiring partner's right springs. But this right is subject to the rule, that a purchaser from the continuing partner *in the ordinary course of business,*

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deals with him as absolute owner and not as mere partner, and is therefore fully protected. This principle is clearly illustrated in *Bourne* v. *Bourne*,[1] affirmed in *Bourne* v. *Bourne*.[2] In this case, there were two partners Grove and Bourne. Grove died on the 9th of May, 1901. Bourne carried on the business and deposited on the 7th February, 1902, title deeds of a property with the Firm's Bankers, Messrs. Berwick & Co. Bourne himself died on the 3rd of September, 1902. The question arose, whether the executors of Grove were bound by this transaction with the Bankers. In each of the judgments, the matter is thus dealt with: Was the act done by the continuing partner in the ordinary course of winding up? In any event, did the third party reasonably believe that the act was necessary for that winding up? In that event, the stranger dealing with the continuing partner acquires an indefeasible title to the property in question. It was contended that the Bankers could not rely upon the mortgage, because they ought to have known that, the debt due by the old firm having been paid, the surviving partner had no right to pledge the estate. Vaughan Williams, L.J., answers thus:

"All I can say with reference to that is that as far as the Bankers are concerned this apparently was an ordinary winding up; there were payments in and payments out, and both the payments in and the payments out must be taken to have been made on account of this realization and winding up."

The judgment of Romer, L.J., contains a very clear statement of the law. What is generally described as "partner's lien" is thus explained:

"That lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property in the hands of any person dealing with the surviving partner in *good faith*."

The next sentence throws further light on this point.

"It is really what one may call a general lien upon the surplus assets, and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realization and to give a good title to persons *dealing in good faith* with him in respect of those properties."

This principle, so clearly formulated, the learned Lord Justice applies to the facts of the case. The point to decide is stated in the following sentence:

"Then the only question remaining is this, Was the debt of the bank which the surviving partner gave the charge to secure one that *really to the knowledge of the bank* was not a partnership debt?"

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1. (1906) 1 Ch. 113. 2. (1906) 2 Ch. 427.

Then follow a number of reasons given to show that the bank was acting in good faith.

"The account with them was a partnership account. It was continued under the partnership name, and apparently for the purpose of the partnership, and it appears to me impossible to say that it is not or may not be reasonable for a surviving partner to continue the partnership account for the purpose of winding up the estate. To my mind the case is very much as if the only change in the account had been to put the account of the partnership in administration. When you find an account of that kind continued—and here *it is only continued for something like nine months* before the charge is given—the bankers, it appears to me, are entitled, in the absence of evidence showing the contrary, *to assume and to be credited with the belief* that the surviving partner is continuing it for the purpose of realization, and that sums paid into that account and sums drawn out of that account in the name of the partnership are paid in and drawn out for the purpose of the partnership. That being so, in this case when the account is finally taken and there is a balance due to the bankers, that, to my mind, is a balance which the bankers are *entitled to believe and to assert was, so far as they were concerned,* a partnership debt in respect of which they were entitled to have the security given which this surviving partner gave"

This judgment contains a very lucid exposition of the principles governing the subject The decisive factor in each case is, did the third party act in good faith? In other words, did he reasonably believe that the act was in furtherance of the winding up? The learned trial Judge, Farwell, J., applies the same test

"So far as I can see there is nothing whatever to put the bank upon any enquiry or to fix them with notice" that the act was not done in the course of the winding up. Romer, L.J., I may point out, relies as an important element upon the fact, that only a short period, like nine months, had elapsed before the charge was given. To this feature of the case, attention is called in the following passage occurring in the *Law of Vendor and Purchaser* by Williams.

"Having regard to this pronouncement, it appears that where the survivor of two partners sells the real estate sufficiently soon after the other partner's death to make it apparent that he is selling to wind up the partnership affairs, he can make a good title to the equitable interest in the land and give a good discharge for the purchase money without the concurrence of the deceased partner's legal representatives."—3rd Ed, Vol. I, pp. 446 and 447.

Another case which is frequently referred to is *In re Langmead's Trusts.*[3] In this case, the executor of a retired partner

3 (1855) 20 Beav 20: 52 E.R. 509.

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sought to have an asset of the dissolved firm, assigned by the surviving partner to a third party, applied to payment of partnership debts. The judgment is apt to mislead if the somewhat complicated facts of the case are not carefully followed.

John Clark Langmead and William Langmead were partners. John retired and a deed executed by the partners came into existence on the 5th February, 1825. It recited

(1) that the partnership was to stand dissolved,

(2) that William should pay to John £2,000 and John in consideration thereof was to convey to William his interest in the partnership, so that, William was to become the sole owner.

(3) to carry into effect these provisions a deed was to be executed which should contain a covenant on the part of William that he would pay all the debts of the concern and indemnify John in regard to them.

William paid £2,000 to John but did not however pay all the debts due from the firm.

John died in 1830 and in 1831 William Langmead assigned a certain policy of assurance, part of the assets of the firm, in favour of Walter Boyd. Subsequent to this, several creditors of the firm proved their debts and were paid out of the estate of John. These were debts which, in accordance with the instrument of the 6th February, 1825, William was bound to pay. The other facts of the case may be ignored.

The question (so far as it is relevant to the present case) was: as between the legatee of John Langmead and the representatives of Walter Boyd who had the title to the policy in question? Sir John Romilly, M.R., decides in favour of Boyd's representatives. True, John was entitled to have the firm's property applied in payment of the firm's debts so long as any debt existed; but more than six years had elapsed after the dissolution of the firm and Walter Boyd *might therefore have reasonably supposed* that all the debts of the concern had been either paid or barred by lapse of time. William Boyd took an assignment for value in these circumstances. He therefore got a good title.

The point to observe in this case is, that the only lien or right which John could have claimed was to have the partnership assets applied in payment of the partnership debts. He had no other lien, for as the facts stated show, he had already received from William an amount representing the value of his share in the assets of the firm. The only outstanding right being to have the debts paid up, the Master of the Rolls observes, that in

the circumstances of the case, the purchaser had valid grounds for supposing that the partnership debts had, during the long period of six years, been either paid off or had been barred and that there were, therefore, at the time no debts due and payable.

There is an observation at bottom of page 511 (E.R.) which reads thus:

"If that had been the case, a purchaser from William Langmead, even with express notice of that trust, would not have been bound to see to the application of the purchase-money"

This is said to favour the contention put forward for the defence. Clearly not. What does this observation mean? The trust being one to apply the proceeds in payment of debts, a purchaser with express notice of this trust is not bound to see to the application of the purchase-money. This does not mean that if the purchaser knew that the purpose of the trust had already been fulfilled, that is, that the debts had already been fully paid off, he would still be protected.

This went on appeal and the appellate judgment reported in *Langmead's Trusts, In re*[4] throws no light on the question, as the decision turned on the language of the instrument.

It is in *Bourne* v. *Bourne* that the principles are stated with great force and clearness and the law as stated in that case has been adopted in standard works on the subject. The observations in *Langmead's Trusts* being somewhat cryptic are not useful to the same extent as those in the first-mentioned case.

The rule is thus stated in *Halsbury's Laws of England*:

"This right is available, and may be enforced not only against the partnership assets and the other partners, but also against all persons claiming through them in respect of their interests as partners, for example, assignees, personal representatives, trustees in bankruptcy, or judgment-creditors, except purchasers or pledgees of specific assets of the partnership *who might reasonably suppose* that all the partnership debts had been paid or barred by lapse of time, or who otherwise deal with the surviving or continuing partner *in good faith*."

The surviving partner has thus a right to dispose of the properties of the dissolved firm for purposes connected with the winding up of that firm; but if the alienation was not for such a purpose, the purchaser acquires, nevertheless, an indefeasible title, provided there are circumstances justifying a reasonable belief that the act was done in furtherance of the winding up; otherwise, he is not protected. Therefore, under the English Law, if the case of a secured creditor does not fall within this rule, his right must give way to the superior claim of the deceased partner's representative. *A fortiori*, the share of the deceased

4 (1855) 7 De G.M. & G. 353: 44 E.R. 138

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partner is not liable to answer for the sums due to unsecured creditors of the new firm. This follows from the authorities I have already cited. The same principle is recognized in three other cases which may be cited. In *West* v. *Skip*[5] the retiring partner's rights against the continuing partner are thus described:

"The partners themselves are clearly joint tenants in the stock and all effects. . . . So, if one partner had died, the debts and effects survived; but yet the survivor is considered in this Court barely as a trustee for the representatives of the deceased; upon which footing the account would be taken, and nothing considered as the share of the survivor till afterward; which is from the continuance of the property in the stock to the representative of the deceased partner, who has a specific lien thereon, although the survivor afterward dies or becomes bankrupt."

In the case supposed, the partnership became dissolved by the death of a partner. What happens if it became dissolved by consent?

"The property in the stock of the partner so going out is not divested thereby, but he remains equally entitled as joint tenant with the other; and in a bill for an account, the stock would be subjected for his satisfaction "

Having dealt with these two cases, the Lord Chancellor proceeds to deal with the rights of the separate creditors of the survivor as against the representatives of the deceased partner.

"Then as between one partner and the separate creditors of the other, the law and those two cases beforementioned say, that they cannot affect the stock any farther than that partner cou'd whose creditors they are "

This case states the principle very clearly. The right of the retiring partner arises from the fact that the partners are joint tenants of the property, each being a part owner This right prevails not only against the survivor but also against his creditors. In *Skip* v. *Harwood*[6] this right was held to prevail even as against execution creditors of the surviving partner.

The third case is *Stocken* v. *Dawson*.[7] The following observations are very pertinent to the case on hand:

"I make no imputation against Oliver, for I believe he thought he was employing his own property, and not the property of another person It was a very unfortunate mistake, and nothing but a mistake, nevertheless we know how frequently it happens, that persons, whose duty it is to withdraw the property of others, endeavour to keep it engaged in trade for their own profit, and it would reduce the jurisdiction of this Court to a very low ebb, if we were told that no person could ever demand an account of the profits arising from an improper use of his money, without making himself and his property liable to the debts incurred by those who were making an improper use of his capital "

This case was affirmed on appeal in 17 L.J.Ch. 282. The point is very fully dealt with in the judgment of the Lord

5 (1749) 1 Ves Sen. 239: 27 E.R. 1006.
6 (1747) 2 Swans. 586; 36 E.R. 739. 7 (1845) 9 Beav. 239: 50 E.R. 335.

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Chancellor. The property improperly and without authority used in the trade by the surviving partner, it is pointed out, never can be liable for the debts of that trade, except where the principle of "order and disposition" applies. (*See* page 286).

I have now dealt with the position under the English Law both of secured and unsecured creditors. Are their rights different under the Indian Contract Act? Section 262 of the Contract Act corresponds to section 39 of the Partnership Act. The former section is but an instance of the application of the principle underlying the English section. If we take the relevant portions of the two sections, there is even a verbal resemblance. S. 262 says:

> "The partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him."

The idea underlying this is, the surplus, to the extent of each partner's share, is his property. That share must be either paid to him, or (that being his property) must be applied in payment of his separate debts. How is this language in substance different from section 39? It says, to quote only the portion material,

> "Every partner is entitled to have the property of the partnership applied in payment of the debts of the firm and to have the surplus assets, after such payment, applied in payment of what may be due to the partners."

Next, section 263 of the Contract Act reproduces in effect section 38 of the Partnership Act. I am unable to follow the argument that this section indicates that the Indian Law is different. It says that, after a dissolution, the rights of the surviving partner continue "in all things necessary for winding up the business of the partnership."

Section 38 enacts that his authority continues

> "so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise"

As Pollock and Mulla point out, the Indian section expresses the English Law "if it be read with sufficient emphasis on the word 'necessary'."

Section 241 is next referred to as showing that the Indian Law departs from the English Law. This argument is again unsound. Section 241 provides that the property left by a retiring partner or the representative of a deceased partner to be used in the business is to be considered a loan within the meaning of section 240. This section (section 241) is one of a group of sections dealing with what is essential to the consti-

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tution of a partnership. (Sections 240 to 241). As Pollock and Mulla point out, these add nothing in principle to the law settled by the decision in *Cox* v. *Hickman*[8] (*see* commentaries under section 240). Section 241 and the allied sections have their counterpart in section 2, sub-section (3) of the Partnership Act, which in their turn, superseded the provisions of the English Act, called, Bovill's Act. Further, how does section 241 apply to the present case at all? It refers to a case where the property is left by the outgoing partner *to be used in the business*: that is to say, where he authorizes his share to be employed in the trade by the surviving partner. The use of the plaintiff's share of the property, in the trade subsequently carried on by Gokuldoss was unauthorized and this section cannot possibly apply.

The next section which has a bearing on the present point is section 253. It is that section which declares that partners are joint owners of partnership property and (as a necessary corollary) that each partner is a part owner [sub-section (1)]. This again is a mere re-enactment of the English rule (*see* section 20 of the Partnership Act) It is impossible, therefore, to deduce from these sections that a departure from the English Law is intended.

I may at this point usefully cite a decision of the House of Lords—*Hugh Stevenson* v. *Aktiengesellschaft*.[9] An English company and a German company carried on a partnership business in England, until the outbreak of war between Great Britain and the German Empire, which operated as a dissolution of the partnership. After the outbreak of the war, the English company continued to carry on the business and to use the partnership plant for that purpose. It was held that the German company were entitled to a share of the profits made after the dissolution by the carrying on of the business by the English company with the aid of the German company's share of the capital. This case emphasizes two points: first, that the rights of partners in the assets of the firm are *rights of property* and do not depend merely on contract; secondly, the continuing partner is treated in respect of the outgoing partner's share in the property, as standing in a *fiduciary relationship*. The argument advanced for the English company is this: section 42 of the Partnership Act, which provides that the outgoing partner is entitled at his option either to interest or to profits attributable

8. (1860) 8 H.L.C. 268: 11 E.R. 431. 9. (1918) A.C. 239.

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to the use of his share, is inapplicable, as in the case of an alien enemy, the provisions of the Act have no application, the contractual relationship between the parties having become completely and finally severed. (*See* the argument of Leslie Scott, K.C.) Lord Finlay in his judgment points out that the question to be determined does not depend upon any contract but on the rights of property which both partners have in the assets of the firm. Viscount Haldane observes that the analogy of a contract in respect of money due does not hold good, as the question is one of property. He adds:

"It depends on the principles which Courts of Equity apply to persons who are in possession of *property* under circumstances in which they are treated as *standing in a fiduciary relationship* "

Lord Dunedin stresses the same two points:

"The result in law is that they carry on the business as *trustees* for the partners until the winding up is effected No doubt the enemy partner cannot receive the money during the war. But his *property* as such is not confiscated . . He will only get the fruits to which his *property* is entitled."

Lord Atkinson deals also with these two aspects at length:

"When a partnership has been dissolved by death or bankruptcy or otherwise, it has been decided that the relation existing between the surviving partner and his former partner . . is a *fiduciary relation* "

The observations of Kindersley, V.C., in *Darby* v. *Darby*[10] are cited by the learned Lord:

"What is the clear principle of this Court as to the law of partnership? It is that, on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership "

The principle so clearly formulated in this case does not conflict with the rule contained in section 43 of the Partnership Act, that the amount due to an outgoing partner is merely a debt and as such is subject to the ordinary law of limitation.

I have now discussed the law bearing on the point. I shall now proceed to consider the various claims put forward. To deal first with the unsecured creditors of the new trade, their claim requires no further notice, as the plaintiff's share is, in no manner, liable for the debts due to them. Then, as regards secured creditors, I shall apply the principles I have stated to the facts of each case.

There are five cases before me relating to the claims of secured creditors. In regard to one of them (C.S. No. 434 of 1923), the parties are unable to agree whether the claim of the

10. (1856) 3 Drew. 495: 61 E.R. 992.

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plaintiff in that case arose or not from a transaction connected with the winding up. I must, therefore, postpone the decision of this case till the report of the Official Referee is received. In regard to the four remaining cases, it is agreed that the claim preferred in each of them is unconnected with the winding up and that the facts giving rise to each of the claims are entirely independent of the business of the dissolved firm. I am asked, for this reason by all concerned, to deal with these four cases without waiting for the Official Referee's report.

It is unnecessary to refer in any detail to the title-deeds of the various properties filed as exhibits. The facts that emerge from the evidence, documentary and oral, are: (1) That the sale-deeds in respect of every item of property (without a single exception) stood in the name of either the firm or the partners. Each claimant dealing with Gokuldoss had thus either actual or constructive notice that the property belonged to the dissolved firm; and (2) that each of these creditors dealt with Gokuldoss, not on the footing that he was the surviving partner engaged in winding up the concern, but under the mistaken belief that he was the manager of a joint Hindu family. In other words, each of them, in dealing with Gokuldoss, believed him to be the managing member of a coparcenary consisting of several members including the minor plaintiff.

We start thus with the position, that the transactions were not, in point of fact, connected with the winding up. It is not even suggested that, apart from the real facts, the claimants were under any misapprehension as regards the true state of things.

I shall first take the case of Messrs. Best & Company (C.S. No. 85 of 1924). The mortgage in their favour comprises several items; but in this enquiry, only with a fractional share in one of them, we are concerned. The partnership became dissolved in 1908 and it is admitted that the transaction which gave rise to the debt did not take place earlier than 1919. In the course of the new trade carried on by Gokuldoss, he bought yarn from Messrs. Best & Company and an amount was found due to them. Promissory notes were executed and properties were mortgaged in respect of this debt. This happened in 1922 and 1923. It is not even suggested that the claimants believed or had reason to believe that these transactions were entered into by Gokuldoss in connection with, or in furtherance of, the winding up. On these facts any question of good faith is entirely excluded. Applying the principles which I have stated,

these creditors are not protected and I must, therefore, hold that the share of the minor plaintiff in C.S. No. 622 of 1923, in the particular item of property to which I have referred, is not affected by the mortgage.

Mr. Duraiswami Aiyar, the plaintiff's learned counsel, calls another argument to his aid, which, in my opinion, is also well founded. He says in effect: a party dealing with Gokuldoss cannot rely upon the latter's apparent authority of surviving partner, if that party did not profess to deal with him as such partner. Messrs. Best & Co. dealt with Gokuldoss on the footing that he was the managing member of a Hindu co-parcenary. As they did not deal with him as surviving partner, the question, whether they believed in good faith that his act was in furtherance of the winding up or not, does not arise. *Farquharson Brothers & Co.* v. *King & Co.*[11] In this case, a man named Capon sold his master's goods fraudulently and under an assumed false name. The fact was that his master authorised him to sell to certain known customers and any stranger misled by this apparent authority, would in law, on the ground of estoppel, be protected. The question arose, whether the respondents who believed Capon (who sold under a false name) to be the real owner acquired a good title. In a striking judgment, Lord Halsbury held that they were not:

"If they had represented their clerk Capon to be invested with disposing power, and (note the importance of the next sentence) if anybody, supposing Capon to be invested with that power, had acted upon it to his own prejudice, then undoubtedly estoppel would have arisen."

But such circumstances did not exist and the respondents, it was held, acquired no title. I need quote only one further sentence from the judgment in that case:

"I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist." (Page 341)

The same principle was applied in *Underwood, Ltd.* v. *Bank of Liverpool.*[12] Scrutton, L.J., observes:

"So in my view you cannot rely on the apparent authority of an agent who did not profess in dealing with you to act as agent" (P 792).

And Bankes, L.J., says:

"They considered that they were still dealing with Underwood, the old customer, the principal, and not with a new Underwood, an agent" (P. 788).

This principle is of general application, not confined to what may be strictly called estoppel, or to principal and agent. In *Solomon* v. *Attenborough*[13] one of two executors, without the knowledge of the other, pawned articles of plate belonging to

11 (1902) A.C. 325. 12 (1924) 1 K.B. 775.
13 (1912) 1 Ch 451

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the estate and misapplied the money. The defendants, the pawn-brokers, dealt with him not as executor but as absolute owner of the plate. It was held that as the pledgor did not purport to act as executor, the defendants had no title to the plate and were bound to deliver it up. The following passage from the judgment of Buckley, L.J., brings out the point:

"They (the defendants' counsel) were further asked for authority for this proposition. that if a person contracts, not purporting to deal as executor, the purchaser who did not know he was executor can for the purpose of supporting the contract rely on the fact that he was executor. For that proposition they have cited no authority, and, so far as I know, there is none"

Bank of Bombay v. *Suleman Somji*[14] also illustrates the same point. Their Lordships cite a passage from *In re Queale's Estate*,[15] which very tersely expresses the principle and which I shall therefore reproduce—

"Fitz Gibbon, L.J., says:

"The bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes Under such circumstances, the bank can, in my opinion, have no better title than that which its debtor really had in the capacity in which he was dealt with, namely, as beneficial owner, *i e*, as residuary legatee." (Page 150)

This principle was applied again by the Judicial Committee in *Raja Balwant Singh* v. *Clancy*.[16] The *ratio decidendi* of *Bijraj Nopani* v. *Pura Sundary*[17] and *Gharib-ul-lah* v. *Khalak Singh*[18] also supports the contention of the plaintiff. On this ground also, the claim of Messrs. Best & Co., in so far as it relates to the plaintiff's share in the item in question, fails.

I understand that there is some dispute as regards the extent of the item (to which the plaintiff in C.S. No. 622 of 1923 is entitled), which is affected by my judgment. The parties expected that they would be able to agree in regard to the item. They have not been able to do so. But, I need not postpone my judgment on that account. For this enquiry I direct the case to be posted on the 15th of April.

I shall next deal with the case of the Maharajah of Pittapuram, the plaintiff in C.S. No. 229 of 1924. The mortgage in his favour, as in the case of Messrs. Best & Company, comprises several items of which we are concerned only with one, the Cathedral Gardens, because the partnership owned that and not the others, on the date of the dissolution. The claimant advanced to Gokuldoss about Rs. 3,85,000. He took a promis-

14 (1908) L.R. 35 I.A. 139: I L R. 33 B 1 18 M.L.J. 435 (P C).
15 17 L.R Ir. 361
16 (1912) L.R 39 I A 109: I L.R. 34 A 296: 23 M L.J. 18 (P C).
17 (1914) L.R. 41 I A 189: I L.R 42 C 56: 27 M L.J. 93 (P C).
18. (1903) L.R. 30 I.A. 165: I.L.R. 25 A. 407 (P C).

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sory note, dated the 22nd of December, 1922, and there was an equitable mortgage created on the following day. It is admitted that, in point of fact, neither this debt nor the debts (due to the Imperial Bank) to discharge which, this loan was raised, were incurred for any purpose connected with the winding up This claimant again dealt with Gokuldoss not as the surviving partner, but as the managing member of a joint Hindu family. This fact is undisputed and, therefore, I do not propose to review the evidence on the point. I may observe that in regard to this property, although the actual conveyance was taken in 1909 it is admitted that it was acquired by the old firm and with its monies previous to the dissolution. As regards the question of good faith or reasonable belief, the remarks I have made in regard to the claim of Messrs. Best & Co. apply equally to this case. For the reasons already given, I hold that the plaintiff's share in the Cathedral Gardens is not affected by the mortgage created by Gokuldoss. This disposes of the claim of the plaintiff in C.S. No. 229 of 1924 so far as this enquiry is concerned.

Then comes the claim of the plaintiffs, Narayanaswami Chetty and others, in C.S. No. 50 of 1927. All the properties comprised in their mortgage had been acquired previous to the dissolution. Their claim calls for no special remark, as what I have already said in dealing with the claimants in the two previous cases, applies equally to them. I therefore hold that the plaintiff's share in these properties is not affected by the mortgage referred to.

Lastly remain the claim in C.S. No. 691 of 1928. The facts connected with this case are the following: Messrs. Kusaldoss and Sons sold goods to Gokuldoss and obtained for the price thereof hundis from him, dated the 16th of September, 1922 and the 25th of October, 1922. The goods had been sold a short time previous to the dates of the hundis. It is admitted that these transactions were not in any way connected with the winding up of the old firm. In this case again, it is not even averred, that the creditors either in fact believed or had reason for believing, that Gokuldoss bought the goods and gave the hundis for any purpose connected with the winding up. Then Messrs. Kusaldoss and Sons filed against Gokuldoss and others a suit in this Court, C.S. No. 433 of 1923, to recover the amount due on the hundis and obtained a decree. When execution was threatened, Gokuldoss offered to give security. An order was made permitting him to do so, and security was accordingly furnished in respect of certain properties and we are now concerned

with only three of them, those set forth in the plaint in C.S. No. 691 of 1928. The evidence of Kishendoss of Messrs. Kusaldoss and Sons makes it perfectly clear that they regarded Gokuldoss not as the surviving partner but as the manager of a co-parcenary. Indeed, each one of these claimants makes a point of the fact that Gokuldoss was throughout believed to be the managing member of a joint family including, among others, the plaintiff. The remarks I have already made apply with equal force to these claimants also. I, therefore, hold that the plaintiff's interest in these properties is not affected by the charge in question.

In the view I have taken, it is unnecessary to consider the argument, that in so far as one of the three items is concerned, no valid charge was created.

I may, in conclusion, observe that the right claimed by the plaintiff and which has been discussed by me, is in respect of the immoveable properties mentioned in Schedule A to the plaint in C.S. No. 622 of 1923. These had been acquired previous to the dissolution and were, therefore, the property of the old firm. There are certain other properties mentioned in Schedule B which the plaintiff admits were acquired subsequent to the dissolution. No evidence has been adduced before me as to how they were acquired. The case was opened with the statement by Mr. Duraiswami Aiyar, that his client did not propose to claim any right of priority over secured creditors in any of those items and that he, therefore, would not advance any argument regarding them. But towards the close of the case the learned counsel intimated that he did not wish to formally abandon his claim as he would like to have liberty to argue, as a question of law, before any appellate tribunal, that his client would have some right as against secured creditors in those items. I merely make a note, at his request, of what is stated to me.

The case is referred to the Official Referee for the taking of an account on the basis of the two judgments I have delivered (the preliminary judgment and the present judgment).

The question of costs including the costs of the Official Assignee deferred, pending the receipt of the report from the Official Referee.

There is a further issue which has been reserved—one that is common to the main suit, C.S. No. 622 of 1923, and several suits filed by certain creditors. Though some evidence was incidentally directed to this point at the main trial, I understand that the parties were under the impression that this issue

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was not then being tried. It is alleged that in 1919 there was a partition which had the effect of separating Dwarakadoss and his minor son, Ramdas, from Gokuldoss. This plea led to the following issue being raised in C.S. No. 622 of 1923:

"Did the 3rd defendant and his father become divided in status in 1919 from the other members of the family and is the 3rd defendant liable thereafter for any of the obligations of the Murali Doss Ram Doss and Company or Madras Import Company, or for any of the other reliefs claimed against the 2nd defendant?"

[The learned Judge discusses the evidence bearing on the question, concludes that there was no definite and decisive intention to divide, and continues]

If my finding that there was no definite and decisive intention to divide is wrong, then, the conclusion is inevitable, that the brothers immediately on partition, the very next moment, became either reunited or entered into a fresh partnership. In either case, the minor's liability cannot be disputed.

Before concluding I would like to mention that I was led to suspect at the last stages of the hearing, that the fact, that the minor's guardian *ad litem* happens to be a Bench Clerk of this Court, gave rise to some dissatisfaction. I understand that he was appointed guardian by the order of the Deputy Registrar made more than six years ago when he was practising at the bar. No objection has since been taken to his continuing to hold the office. To place the matter beyond doubt, I asked Sir C. P. Ramaswami Aiyar if there was any desire that he should be removed from his office or whether his conduct was open to question. I am glad to say, he assured me, that there was no ground for complaint. I may note that when I delivered judgment on the principal issue in the case, I provided by consent, for the guardian's fee, although, as it now transpires, his part of the case had not been gone into then.

By consent, the plaintiff and the Official Assignee shall get their costs of this suit and in proceedings therein subsequent to my judgment, dated 2nd May, 1928, up to date. Certified for two counsel on both sides. The question whether these costs shall come from the 'A' Schedule or 'B' Schedule properties is reserved. The Receiver will for the present pay Rs. 3,000 to the plaintiff and Rs. 3,000 to the Official Assignee towards these costs. If on taxation it is found that either party has received more than he is entitled to, he shall bring the excess into Court.

A.S.V. *Case referred to Official Referee for taking of an account on basis of the preliminary judgment and the present judgment.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE PAKENHAM WALSH.

Manikka S. Balaramier .. *Petitioner* in both petitions (Petitioner in C.R.P. No. 801 of 1926 on the file of the High Court)*

v.

Vasudevan and others .. *Respondents in both (Proposed L.Rs. of the deceased respondent in do.).*

Balaramier v. Vasudevan.

Civil Procedure Code (V of 1908), O 22, R 6—Death of a party to a legal action—Decision on the merits of the action after the death and before abatement—Legal representatives not brought on record on the date of the decision—Validity of the decision.

A legal action, on the death of a party to it, passes into a state of suspense which itself passes into a state of abatement if the legal representative is not brought on record within time, and, while the action is in a state of suspense, no valid act which is not purely formal or processual, but which involves a decision on the merits of any part of the action, can be done by the Court.

C.M.P. No. 763 *of* 1928.—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to order that Civil Revision Petition No. 801 of 1926 (S.C.S. No. 1484 of 1925 on the file of the Court of Small Causes at Kumbakonam) may be reheard and the decree may be passed against the respondents' legal representatives instead of the deceased respondent, G. Kumaraswami Chettiar, in the above Civil Revision Petition.

C.M.P. No. 764 *of* 1928.—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the entries of the names of the respondents herein, *viz.*, (1) Vasudevan, (2) Rathnam, (3) Krishnamurthi (minor), (4) Ranganathan (minor), (5) Annayyan (minor), and (6) Narayanan (minor) in C.R.P. No. 801 of 1926 on the file of the High Court (S.C.S. No. 1484 of 1925 on the file of the Court of Small Causes at Kumbakonam) as the legal representatives of G. Kumaraswami Chettiar, the respondent therein deceased.

V. Sundaram Aiyar and *T. S. Ramaswami Aiyar* for petitioner in both.

S. Rangaswami for 1st respondent in both.

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*C.M.Ps. Nos. 763 and 764 of 1928. 17th July, 1929.

The Court made the following

ORDER.* *Wallace, J*—We are concerned with two petitions, C.M.Ps. Nos. 763 and 764 of 1928, both arising out of the hearing by this Court of C R P. No 801 of 1926. That petition was heard by Mr. Justice Devadoss and judgment was pronounced on 6th December, 1927. It has subsequently come to light that the respondent in the Civil Revision Petition died on 26th Nov., 1927, a few days before the judgment was pronounced. The formal order of this Court on the Civil Revision Petition shows respondent's name The petitioner before us on 2nd February, 1928, within three months of the death of the respondent, has put in the present two petitions, No. 764 to bring on the legal representatives of the deceased in C.R.P. No. 801 of 1926 and No. 763 to have the Civil Revision Petition re-heard. He contends, however, that the latter petition is unnecessary and that he is entitled to have the legal representatives brought on and the judgment of Mr. Justice Devadoss to stand against them. His main contention is that when a party to a legal action has died and the legal representatives have been brought on in time so that the action does not abate, the bringing on of the legal representatives validates all proceedings in the action up to the date of their being brought on, which have taken place since the death of the party. This involves the proposition that proceedings to which the legal representatives are not a party and to which no representative of theirs was a party will nevertheless bind them. It is argued that that is not improper or illegal, because the case of the respondent in the Civil Revision Petition, though he was dead, was fully argued by his learned Advocate, and therefore the case of the legal representatives has not suffered. But that is to bind the legal representatives by the case of the respondent and it cannot be argued that that cannot in law ever prejudice them.

The point is practically *res integra*, but I consider that the true view must be that the legal action, on the death of a party to it, passes into a state of suspense, which itself, if the legal representative is not brought on record within time, passes into a state of abatement, and that while the action is in a state of suspense, no valid act which is not purely formal or processual, but involves a decision on the merits of any part of the action, can be done by the Court. A simple but not exhaustive test would be: would the order by which it is sought to bind the

*The order was written by Wallace, J (now on leave) and pronounced by Pakenham Walsh, J., on behalf of the Bench.

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Wallace, J.

legal representative be of the nature of a *res judicata?* I do not think the rulings cited before us are of much assistance. So far as the intention of the legislature may be gathered, Rule 6 of Order 22 is an indication that it did not intend to apply the principle contended for by petitioner beyond the restricted operation of that rule. It is easy to foresee that the adoption or the rejection of petitioner's principle will alike give rise to difficulties. These will have to be dealt with as they arise. In the present case I consider that the proper order to pass is to hold that the Civil Revision Petition has been in suspense since the date of respondent's death, to bring on the legal representatives in it now and to have the Civil Revision Petition re-heard, since the order pronounced in it by Mr. Justice Devadoss has now no validity in law. I would grant both petitions, and post the Civil Revision Petition for fresh hearing, and direct each party to bear his own costs in these petitions.

Pakenham Walsh, J.—I agree.

N.S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

The Sabapathi Press Co., Ltd. .. *Appellant**

v.

R. Sabapathi Rao and others .. *Respondents.*

Sabapathi Press Co., Ltd. v. Sabapathi Rao.

Indian Companies Act (*VII of* 1913), *Ss* 156 (*iv*), 158 *and* 166—*Limited company—Members who have paid up their share capital fully—Petition by such members for winding up of the company—Maintainability—S.* 162 (6) —*Just and equitable—Circumstances amounting to.*

The fact that a member of a limited company is not liable, under section 156, clause (iv) of the Indian Companies Act, to pay more than the unpaid amount of his share does not make him the less a contributory in a case where his share capital is fully paid up, and, consequently, a petition for winding up of a limited company, filed by some of the shareholders who have paid up their share capital fully is maintainable under section 166 of the Act.

In re Anglesea Colliery Company, (1866) 1 Ch. App. Cases 555 and *In re National Savings Bank Association,* (1866) 1 Ch. App. Cases 547 followed.

Where it was found by the Court that a press which was a limited company was leased to a person and subsequently sub-leased by that lessee for large profit, that suits had to be filed by numerous shareholders against the company for recovery of the dividends due to him and that the Chairman of the press was not authorised by the persons whose names appeared on the dividend warrants to give an acquittance or receipt on their behalf,

Held, that it was just and equitable that the company should be wound up under section 162, cl. (vi) of the Indian Companies Act.

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*O.S.A. No. 10 of 1928. 18th April, 1929.

Sabapathi Press Co., Ltd. v. Sabapathi Rao.

On appeal from the judgment of the Hon'ble Mr. Justice Beasley, dated 16th November, 1927 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 94 of 1922.

K. Venkata Rao, appellant in person.

B. Somayya and *T. R. Arunachalam* for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—The first point argued in this appeal is a question of law. It has been contended before us by the Chairman of the Sabapathi Press Co., Ltd., who argued the case personally, that this petition for winding up filed by some shareholders who have paid up their share capital fully is not maintainable. Under section 166 of the Companies Act, an application to the Court for the winding up of a company shall be by petition presented either by the company or by any creditor or creditors, contributory or contributories, etc. Section 156 of the Act runs thus:

"In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following . . "

Clause (iv) lays down the following qualification:

"In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member."

It is therefore contended before us that a member who has fully paid up his share is not liable to contribute anything under this clause and therefore he is not a contributory within the meaning of S. 166. Section 158 defines the term "contributory." It means "every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory." The corresponding sections of the then English Act were the subject of consideration in English Courts in *In re National Savings Bank Association*.[1] The question was considered by Knight Bruce and Turner, L.JJ., in a case which came up on appeal before them from an order of the Master of the Rolls. S. 74 of the English Act then under consideration is the same as section 158. Section 38 corresponds to our section 156. It was held by Lord Justices that all past members of the company were liable to contribute and the qualification that a

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1 (1866) 1 Ch. App. Cases 547.

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Ramesam, J.

member shall not be liable to pay more than the unpaid amount of his share does not make him the less a contributory in the particular case where his share capital is fully paid up. The case follows another decision in *In re Anglesea Colliery Co.*[2] Following these decisions, we hold that this petition is maintainable. In some cases it has been laid down as a matter of practice that the petition by a single shareholder ought not to be allowed unless it is supported by other shareholders or creditors. In the present case, the petition is supported by no less than 84 shareholders. The petition also alleges that, in the event of winding up, the petitioners have a tangible interest in the surplus assets. We therefore do not see any kind of objection to the maintainability of this petition.

The next point relates to the grounds on which the company is sought to be wound up S. 162, cl (vi) says that a company may be wound up by the Court, if the Court is of opinion that it is just and equitable that the company should be wound up Clauses (i) to (v) of the section do not apply. A similar clause was the subject of construction by the Privy Council in *Loch* v *John Blackwood, Ltd.*[3] Following that case, our brothers, Spencer and Srinivasa Aiyangar, JJ., reversed in *Sabapathy Rao* v. *Sabapathy Press Co., Ltd.*[4] the original order of Kumaraswami Sastri, J., dismissing the petition and remanded the case back for consideration on the ground that the reasons alleged in the petition will, if made out, be enough to sustain an order of winding up as just and equitable The learned Judge, our brother Beasley, J., has now found that on one occasion the press was auctioned and leased out to K V. S. R & Co. and that on the next day it was subleased to Pola Sankariah for Rs. 10,523. Again in another year the same press was leased out to Mr. Ramachander, son of the Chairman, Mr. Venkata Rao. It was then subleased to Pola Sankariah for Rs 14,300. The learned Judge observes that the very large profits made by intermediaries make the transactions not altogether proper The next point, the learned Judge relied on, is that suits had to be filed against the company for the recovery of dividends. Mr. Venkata Rao sought to explain this fact by saying that sometimes the shareholders would not draw their dividends so that they might make this complaint, and various other explanations are given in connection with the other shareholders. But whatever the

2 (1866) 1 Ch App Cases 555 3 (1924) A.C. 783.
4 (1924) I.L R 48 M. 448: 48 M.L J 118.

explanations may be, there is no doubt that there are numerous cases of shareholders having had to sue the company for recovery of their dividends. The learned Judge also referred the matter to the Official Referee on two points, that is, to look into the accounts and also examine certain dividend warrants for the purpose of satisfying himself on the questions as to whether dividends had been paid and whether Mr. Venkata Rao was authorised by the persons whose names appear on the dividend warrants to give an acquittance or receipt on their behalf. On both these questions the report of the Official Referee was against Mr. Venkata Rao. It is said that Mr. Venkata Rao had no opportunity of explaining these matters On the other side, it is stated that his counsel, Mr. Sydney Smith, did not question the correctness of the report. The learned Judge also observes that there are other matters which he need not go into. Having regard to all these circumstances, we think it is not a matter in which we should differ from the discretion of the learned Judge.

We dismiss this appeal with taxed costs on the higher scale of the petitioners. The taxed costs of the Official Liquidator will be recovered out of the estate The costs of the respondents may be paid out of the sum of Rs. 800 which has been deposited by the appellants as security for costs.

N.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of Common Pleas, Barbados.]

PRESENT:—VISCOUNT SUMNER, LORD CARSON AND LORD BLANESBURGH.

Charles Hubert Kinch .. *Appellant**

v.

Edward Keith Walcott and others .. *Respondents.*

Evidence Act (I of 1872), S 115—Consent order—Estoppel by—Order of Court not made by consent—Effect of—Distinction—Fraud or mistake—Consent order obtained by—Void or voidable—Setting aside of—Mode of—Suits different—Consent orders in, intended to stand or fall together—Repudiation of one only of—Permissibility

For purposes of estoppel an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal.

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*P.C. Appeal No. 48 of 1928. 19th March, 1929.

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A consent order, even where it has been obtained by fraud or mistake, is not a nullity. At the best, so far as the party aggrieved by it is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. It can only be so set aside in an action or proceeding directed to that special end

Where consent orders in two suits were intended to stand or fall together, *Quaere*, whether it is possible for one of the parties to the orders to stand by the order in one suit while repudiating the order in the other

Appeal No. 48 of 1928 from a decree of the Court of Common Pleas, Barbados.

D. N. Pritt, K.C. and *S. P. J. Merlin* for appellant.

C. J. W. Farwell, K.C. and *C. R. Blanco White* for respondents.

19th March, 1929. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—Before proceeding to define with particularity the issue which on this appeal their Lordships must determine, it may be well for clearness sake to set forth, as succinctly as possible, the somewhat involved story which leads up to it. All the parties live in Barbados. The appellant is a merchant there; the respondent Walcott, a Barrister-at-Law, and the respondent Hutchinson, a solicitor, both practising in the Island. The respondent Taylor is a commercial agent who was for some time in the employment of the appellant.

For many years prior to 1925 the appellant had acted as agent on commission for a Newfoundland firm of Monroe & Company, and in later years for that firm's successors in business the Monroe Export Company, Ltd. The appellant's agency was concerned mainly with the sale on commission of fish consigned by the Monroes to him in Barbados, and with the purchase in the island, also on commission, of molasses on their account.

In 1925 disputes arose between the Monroe Company and the appellant with reference to his transactions, and in March, 1925, the Company instituted against him in the Barbados Chancery Court a suit claiming full accounts on allegations, *inter alia,* that profits had been improperly withheld from the Company in connection with his purchases of molasses, and that the appellant was suppressing his books in which his transactions on behalf of the Company were recorded. In that suit, to be referred to as the suit for accounts, the respondent Walcott acted as Counsel, and the respondent Hutchinson as solicitor for the Company, the appellant being duly represented by Counsel and

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solicitors of his own. In the result on the 5th June, 1925, after a long trial, a decree in the suit adverse to the appellant was pronounced by the Acting Vice-Chancellor, who directed the accounts of the appellant's transactions to be re-opened and ordered him to make payment together with the costs of suit of the amount found due on these re-opened accounts when taken. A stay of execution was, however, upon terms granted to enable the appellant, if so advised, to appeal.

Thereupon, indeed, within a few days, negotiations were on foot for a settlement. These were conducted by the respondents Walcott and Hutchinson on behalf of the Company with the appellant direct, that is to say, without the intervention of any legal advisers on his behalf. As a result of them a deed prepared by the respondent Hutchinson was on the 18th June, 1925, executed by the appellant. It bore that he had settled the Company's claims against him on all accounts by a payment in British currency of $15,000 thereby acknowledged to have been received, and by a mortgage thereby made of specified properties of his own to secure an additional sum the equivalent of $25,000 with interest. All further proceedings in the suit for accounts were to be discontinued.

This deed contained recitals which apparently the respondent Hutchinson now agrees were not in complete accord even with his own intent at the time and were less favourable to the appellant than they should have been. But the complaints of the appellant with reference to the transaction went far beyond any such matters of detail and as ventilated by him in correspondence and in legal proceedings to which reference must later be made were that he was left to act in the matter without legal advice; that so far as the deed was a mortgage-deed he executed it without understanding and indeed being misinformed as to its nature and that his execution of a deed at all was in effect the result of the pressure of the respondents Walcott and Hutchinson who threatened that, if he did not pay the $15,000 and execute the deed as presented to him, criminal proceedings would be taken for alleged misdeeds in relation to his purchases of molasses as agent for the Company.

Nor did the appellant keep to himself these charges of his against these respondents. In two letters, one of 2nd August, 1925, and the other of 19th August, 1925, addressed to Mr. Monroe, the Managing Director of the Monroe Company, he asserted in substance that it was as a result of blackmail on their part that he had been coerced to put up what he described as the guarantee.

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These letters with their grave charges against them of personal and professional misconduct having come to the knowledge of Mr. Walcott and Mr. Hutchinson they, on the 8th June, 1926, joined as plaintiffs in an action for libel against the appellant. In it they each claimed $5,000 damages. On the 29th June, 1926, the appellant put in his defence. He pleaded justification in terms which included his allegations already referred to, and on the next day, the 30th June, he followed this up by commencing in the Chancery Court of the Island a suit against the Monroe Company—to be referred to as the rescission suit—claiming that the settlement and mortgage-deed of the 18th June, 1925, should be set aside by reason, *inter alia,* of the matters pleaded by him in his plea of justification On the same day he made an affidavit in the rescission suit in support apparently of an application to restrain a threatened sale of his property mortgaged to the Monroe Company by the deed he was therein seeking to impeach. In that affidavit he repeated in effect in relation to the settlement his allegations against the two respondents to which reference has already been made.

The respondent Hutchinson deeply resented these sworn imputations upon his personal and professional conduct, and it is now his own avowal that he thereupon resolved and remained determined to institute against the appellant, at the earliest convenient opportunity, a prosecution for perjury for having made them His intentions in that matter however he, it is asserted, kept to himself, more particularly during the negotiations for the settlement of the libel action and the rescission suit which was reached by consent orders made in each on the 16th November, 1926, and the provisions of which are, on this appeal, all important.

The terms of the consent order in the libel action were that upon the appellant by his Counsel withdrawing all allegations of fraud and duress pleaded in his defence and upon his expressing regret at having pleaded justification and withdrawing the plea, and upon the respondents' Walcott and Hutchinson undertaking not to bring any fresh action in respect of the subject-matter of that action it was by consent ordered that the respondents should be at liberty to discontinue the action and that the appellant should pay them the sum agreed on by Counsel for their costs of suit. In the consent order in the rescission suit the appellant by his Counsel unreservedly withdrew all charges of fraud, malpractice and duress against the respondents Hutchinson and

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Walcott contained in the bill of complaint and affidavits therein, the Company, on the other hand, stating that it made no charge in that suit against the appellant of having suppressed the books of account in the pleadings mentioned. For the rest, the settlement of the 18th June, 1925, was in effect set aside; the properties thereby mortgaged to the Company were to be reconveyed to the appellant at his expense; the accounts were to be taken as directed by the judgment of the 5th June, 1925, these accounts being extended so far as molasses were concerned, the appellant was to pay the Company's taxed costs of the suit for accounts, but each party was to bear his own costs of the rescission suit.

As will appear presently, these consent orders lie at the root of the questions at issue upon this appeal, and it is convenient now to state with reference to them that there is, in their Lordships' view, no room for doubt that an underlying condition of the negotiations for the settlement of the libel action and of the rescission suit, as also of the final arrangement for the settlement of both, was that the action and suit should be settled at the same time. The settlement of one was dependent upon the settlement of the other and the consent orders, although separate, must stand or fall together. The consent order in the rescission suit has, it appears, been acted upon by the Monroe Company, and the appellant has obtained advantages under it which, so far as their Lordships have been informed, he has never disaffirmed. The importance of all this in its relation to the ultimate question before the Board will presently become apparent.

The third respondent Taylor now takes and thereafter retains a prominent place in the narrative. That respondent, as has already been said, was at one time in the employment of the appellant. There had been grave differences between them. Taylor had been prosecuted by the appellant for embezzling his moneys. He was a witness for the Monroe Company in the suit for accounts, and it has been an allegation of the appellant that Taylor was paid $1,200 for so giving evidence against him, and that so far from the appellant having suppressed or concealed his books of account as there alleged, these books were at all material times in the possession or under the control of the respondents Hutchinson and Taylor themselves. Imputations upon Taylor were clearly not accepted by the learned Vice-Chancellor in the suit for accounts, and the adverse decree against the appellant in that suit must have encouraged Taylor to proceed against the appellant in respect of a

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letter of the 29th October, 1924, addressed by him to the same Mr. Monroe above referred to, in which he alluded to Taylor as the vagabond who had stolen his cash books to save himself before the Courts. Taylor, it seems, had even during the pendency of the suit for accounts instructed the respondents Walcott and Hutchinson to commence on his behalf at some suitable time an action against the appellant for libel in respect of that statement, and the appellant's complaint against all three is—and it is the complaint on which the present action is based—that the respondents Walcott and Hutchinson when negotiating with him for the settlement of the suit for accounts on the 18th June, 1925, intimated that no such settlement was possible unless the appellant would also agree to pay to the respondents Walcott and Hutchinson on the respondent Taylor's behalf the sum of £1,200 by way of compromise of Taylor's cause of action in respect of the appellant's defamatory letter to Mr. Monroe. That sum the appellant did pay, and the present action, which was commenced on the 31st March, 1927, has been brought to recover damages from the three respondents in respect of the obtaining from him of that £1,200, the appellant setting up against the three the allegations which he had already made and withdrawn against the respondents Walcott and Hutchinson separately in relation to the settlement of the suit for accounts, namely, that they had all wrongfully conspired to extort that money from him by means of threats to institute against him the criminal proceedings already mentioned.

The pleadings in the action are voluminous. It suffices, however, in the events which have happened, to set forth only the following paragraphs of the statement of claim:—

"3. Some time between the 5th and 19th days of June, 1925, the defendants wrongfully and unlawfully conspired together to extort money from the plaintiff.

"4. In pursuance of the said conspiracy the defendants said and did the following acts and things:—

"(a) The defendants Hutchinson and Walcott threatened to cause the plaintiff to be prosecuted for a criminal offence or offences alleged by them to have been committed by him arising out of the purchase of molasses by the plaintiff as agent for the Monroe Export Co, Ltd, of St. John's, Newfoundland, and the shipments by him of such molasses to the said company unless he the plaintiff paid to them the said Hutchinson and the said Walcott, the legal advisers of the defendant Taylor, the sum of one thousand five hundred pounds sterling in compromise of an alleged cause of action which the defendant Taylor had against the plaintiff for libel in respect of a letter written by the plaintiff to the said Monroe Export Co, Ltd, and|or W S Monroe, a Director of the said Company and|or slander.

"PARTICULARS

"For some time prior to the 18th day of June, 1925, the defendants Walcott and Hutchinson had threatened to prosecute the plaintiff for the alleged criminal offence or offences mentioned unless he compromised a then pending suit of the said Monroe Export Co, Ltd, against himself

"On the said 18th day of June, 1925, it was definitely agreed between the plaintiff and the defendants Walcott and Hutchinson that the defendants Walcott and Hutchinson would abstain from prosecuting the plaintiff on certain terms then agreed between them, which included the payment by the plaintiff to the defendant Hutchinson of $15,000 on the 19th day of June, 1925."

By their defences the respondents denied the allegations of conspiracy and asserted—and so much is now admitted—that the matters referred to in the above italicised paragraphs of particulars were included among the allegations expressed to be withdrawn in the two consent orders already mentioned. Accordingly the respondents Walcott and Hutchinson pleaded and contended that by reason of these consent orders the appellant is in this action precluded as against them from raising the matters so withdrawn; and all the effective proceedings in the action have so far been concerned with this plea alone.

On the 6th July, 1927, the cause came on for trial before the Chief Justice of Barbados, and a special jury. The point just mentioned was at once taken by Counsel on behalf of the respondents Walcott and Hutchinson, and after full argument was on the 8th July, 1927, upheld as a preliminary finding by the learned Chief Justice. Against his order to that effect the appellant appealed to the West Indian Court of Appeal, and on the 8th September by consent the appeal was remitted to the Chief Justice to determine whether the appellant was or was not on any grounds estopped or precluded from alleging or proving the allegations withdrawn by him in the consent order in the libel action, the appellant being at liberty to apply to amend his reply so as to raise to the plea of estoppel an answer of fraud and non-disclosure. By the same order the appellant undertook to discontinue his action against all the respondents and not to bring any fresh action against any of them in respect of the matters alleged therein should any appeal by him from the decision on the matter thereby remitted be unsuccessful in the West Indian Court of Appeal and|or before the Judicial Committee of the Privy Council This undertaking is now invested with a decisive significance. Its effect is that the appellant's whole action now depends upon the result of this appeal although that appeal has direct reference only to a preliminary finding in the cause.

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In pursuance of leave reserved by the order of the West Indian Court of Appeal the appellant in an amended reply pleaded that the consent orders were obtained by the respondents Walcott and Hutchinson by their fraudulent concealment from or omission to disclose to him the fixed and unalterable determination of the respondent Hutchinson to prosecute the appellant for perjury committed in his affidavit already mentioned. In a rejoinder these two respondents asserted that neither of them was under a legal obligation to disclose such determination to the appellant and further that the appellant or his agent Mr. Hamel Wells, Barrister-at-Law, was at all material times aware of it.

On these amended pleadings the case as so remitted by the Appeal Court came before the Chief Justice of Barbados on the 28th November, 1927. He then ordered that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to the evidence being heard on the merits of the case. This is the first order now appealed against. The argument on estoppel then proceeded and in the result the learned Chief Justice held that the respondents Walcott and Hutchinson were under no duty to communicate to the appellant the determination which had been arrived at that he should be prosecuted for perjury, and on the main question whether the appellant was precluded from alleging or proving the allegations withdrawn in the consent order in the libel action, the learned Judge adhered to his previous decision of the 8th July, 1927. By his order of the 2nd December, 1927, he declared accordingly. This is the second order against which the appellant now appeals to His Majesty in Council.

As to the first of these orders appealed from their Lordships entertain no doubt that the learned Chief Justice was well warranted in directing that the question of estoppel raised by the respondents Walcott and Hutchinson should be tried and determined prior to evidence being heard on the merits of the case—should be tried, that is to say, as a preliminary issue. So soon as the terms of the order of the Appeal Court of the 8th September, 1927, are looked at, no other course, as it seems to the Board, was open to the learned Judge. That order was a consent order. The question of estoppel had been brought before the Court on an appeal from an order made on a preliminary issue. It is the same preliminary issue albeit on an extended basis that is referred back to the Court of Common Pleas for further consideration. So much clearly appears from the terms

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of the undertaking embodied in the order and already referred to. It is true that no evidence was heard by the learned Chief Justice on the new allegations of fact made by the respondents Walcott and Hutchinson in their new rejoinder, and directly relevant to their plea of estoppel. But it is not to the appellant's disadvantage that in the absence of evidence in support of these allegations, his assertion that he remained in ignorance of the respondent Hutchinson's determination to prosecute him for perjury was, by the learned Chief Justice, and must now, on this appeal, be accepted as correct. In short, no ground whatever has in their Lordships' judgment been shown for interfering with the order of the 28th November, 1927.

The second order appealed from is that of the 2nd December, 1927, against the decision of the Chief Justice that the respondents Walcott and Hutchinson had effectively raised an estoppel against the appellant. Their Lordships heard from learned Counsel for him an elaborate and able argument which canvassed, in its course, many difficult questions of general interest and importance. Their Lordships, however, do not find it necessary on the present occasion to go into these questions. In the last analysis of the real position the appeal from this second order of the learned Chief Justice can, as they think, be determined by reference to considerations of great simplicity.

First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne, J., in *Wilding* v. *Sanderson*,[1] "must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose." In other words the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal. The consent order in the libel action has neither been abandoned nor set aside. Accordingly it stands at this moment as an order effective to prevent the appellant from setting up against the two

1. (1897) 2 Ch. 534.

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respondents parties to it the charges against them thereby withdrawn. Nor is it any answer for the appellant to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity. It is, first of all, in no sense true that the order is a nullity. At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant can only be so set aside in an action or proceeding directed to that special end. The decision of Romer, J., in *Ainsworth* v. *Wilding*[2] in that sense seems to their Lordships to be not only in accordance with principle but alone consistent with convenient practice, and their Lordships note that it has been accepted and followed by this Board in *Firm of R.M.K.R.M.* v. *Firm of M.R.M.V.L.*[3] But there is a further and special reason why in the present case the requirements of that decision should be insisted upon. As has already been pointed out the consent orders in the rescission suit and libel action were intended to stand or fall together. Even if it were possible for the appellant to stand by the order in the suit while repudiating the order in the action it is clear that he cannot take that course except in some proceeding to which the Monroe Company is either party or privy, and that company is in no sense at all either party or privy to these proceedings.

On this short ground therefore their Lordships are of opinion that the order of the 2nd December, 1927, should be upheld. In the view they take of the position it is not open to them in these proceedings and in any case it is unnecessary for them to decide and they withhold any opinion upon the question whether the respondent Hutchinson during the negotiations for the consent orders was entitled to keep to himself his fixed determination to prosecute the appellant for perjury. And if they refrain from going further into that question their action is in no way attributable to any failure on their part to appreciate its importance. The slightest hint that such a prosecution was in reserve might well have deterred the appellant, ignorant of the fact, from making even a formal withdrawal of his sworn charges, and that danger cannot well have been absent from Mr. Hutchinson's mind, seeing that the withdrawal made is only consequential on the undertaking not to bring any fresh action in

2 (1896) 1 Ch. 673.

3 (1926) A.C. 761 at 771.

respect of these charges. When to all that is added the fact that this withdrawal must seriously and might fatally embarrass the appellant in his answer to a charge of perjury when brought, this question of concealment, it is seen, involves considerations of wide importance to the legal profession as a whole. It is, however, a question which, owing to the high standard of honour prevailing in the profession, rarely arises in practice. Moreover, in the present case the consequences for the appellant have not been so serious as they might have been. For, when the prosecution was at length launched by Mr. Hutchinson, the Grand Jury, after hearing the evidence both of himself and Mr. Walcott, threw out the Bill. Accordingly, while in no way intimating disagreement with the Chief Justice in the conclusion which he reached on this subject, their Lordships refer, so far as any observations of theirs might affect it, to leave this question as applied to a case so extreme as the present, entirely open.

For the reasons already given, they are of opinion that this appeal fails. They will accordingly humbly advise His Majesty that it be dismissed and with costs.

Solicitors for appellant: *Markby Stewart* and *Wadesons.*

Solicitors for respondents: *Minet May & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT:—LORD SHAW, LORD ATKIN AND SIR LANCELOT SANDERSON.

Amjad Khan .. *Appellant** (*Plff.*)

v.

Ashraf Khan and others .. *Respondents* (*Defts.*).

Mahomedan Law—Gift inter vivos—*Validity—Conditions—Hanafi Scool—Life-interest—Transfer by gift of—Validity—Hanafi School—Gift deed—Intention of donor—Ascertainment of—Mode of—Wife—Gift deed by husband to—Estate conveyed—Life-interest in entire property with power of alienation over a part—Gift of*

To constitute a valid gift *inter vivos* under the Hanafi School of Mahomedan Law, three conditions are necessary:—(1) Manifestation of the wish to give on the part of the donor. (2) The acceptance of the donee, either impliedly or expressly. (3) The taking possession of the subject-matter of the gift by the donee, either actually or constructively.

The intention of the donor is to be ascertained by reading the terms of the deed as a whole, and giving to them the natural meaning of the language used.

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*P.C. Appeal No. 125 of 1926 26th February, 1929.

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M, who was a Hanafi Mussalman and who owned proprietary shares in 11 villages, made a will on 18th January, 1894, and on the same day executed what was called an agreement, by which he made a declaration that he would remain in possession of the properties comprised in the will as long as he lived, but that he should not have power to alienate the same. On 17th January, 1905, he executed a deed, the material portion of which was as follows.—

"Whereas I am in possession and occupation of the same" (that is, the proprietary shares mentioned above) "and whereas in respect of the same I have already executed a will and an agreement, dated 18th January, 1894, but as I want to avoid any difficulty to my wife in obtaining possession over the willed property after me, I, therefore, by means of this document, have made a gift without consideration of my entire property detailed below with all external and internal rights and without the exception of any right or part, to my wife . . . . subject to the condition that, out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5,000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest, worth Rs. 10,000, she shall not possess any power of alienation but she shall remain in possession thereof for her lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals, *viz*, A, B, and their heirs, in equal shares, and these heirs of mine shall become owners with full proprietary powers, and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her, and therefore from to-day I have ceased to possess any right or claim in respect of the gifted property, and my wife from to-day became owner and possessor of the aforesaid property in accordance with the terms of this deed."

Held, that the deed of 17th January, 1905 did, on its true construction, afford clear proof that the donor intended to make and did make a gift to his wife of a life-interest only in the entire property comprised in the deed together with a power of alienation in respect of one-third of the property.

Quaere: Whether under the Hanafi School of Mahomedan Law a transfer of a life-estate could not be made by means of a gift, in other words, whether under the said law there could not be a transfer of any interest in property by way of gift *inter vivos* except an absolute interest.

Consolidated Appeal No. 125 of 1926 from two decrees, both dated the 15th December, 1924, of the Court of the Judicial Commissioner of Oudh (Messrs. Ashworth and Wazir Hasan), which varied a judgment and decree, dated the 30th May, 1923, of the Subordinate Judge of Bara Banki.

The main questions for determination on the appeal to the Privy Council related to the legal validity aand meaning and effect of a deed of gift, dated the 17th January, 1905, executed by a Sunni Mahomedan, Ghulam Murtaza Khan, in favour of his wife, Musammat Waziran.

The Subordinate Judge held that the deed evidenced an absolute gift in respect only of one-third of the properties in question, and not in respect of the remaining two-thirds, but the learned Judicial Commissioners decided that the gift was not effectual and valid in respect of one-third as well, and

accordingly dismissed the suit of the appellant, who claimed the entire properties in question as the sole heir of Musammat Waziran.

The material facts of the case will be found in the report of the case in the Court below: see 87 Indian Cases 445, and also in their Lordships' judgment, where the terms of the deed of gift in question are set out *in extenso*.

At the hearing of the appeals in the Judicial Commissioner's Court, Oudh, the present respondents gave up their contention that the donor of the gift was a Shiah Mahomedan, and accepted the finding of the Subordinate Judge that he was a Sunni Mahomedan, so that the deed of gift fell to be governed by the Hanafi Mahomedan Law as to its construction and legal effect.

Although the learned Judicial Commissioners' ultimate decision was against the present appellant, there was a difference of opinion between them on substantial questions involved in the case.

Mr. Wazir Hasan (1st Additional Judicial Commissioner) held, agreeing with the finding of the Subordinate Judge, that the donor completed the gift by delivery of the gifted property to the donee as required by the Mahomedan Law, but he held that Musammat Waziran took only a life-interest under the deed of gift, both as to the one-third of the gifted property over which she had the power of alienation but which she never exercised and as to the two-thirds of the property over which she had no such power of alienation under the deed. He therefore held that Musammat Waziran did not leave any property upon her death, and the present appellant was not entitled to the property covered by the deed of gift.

Mr. Ashworth (2nd Additional Judicial Commissioner) held that upon the true construction of the deed of gift according to the Hanafi School of Mahomedan Law, the effect of the deed was to give to Musammat Waziran an absolute estate in the whole of the gifted property, and that the condition that she was to take a life-interest only in two-thirds of the property was invalid according to the Hanafi Law, but he held that delivery of possession of the gifted property to the donee was not established in the case. He therefore held that the gift failed in its entirety and that the present appellant was not entitled to the property covered by the deed.

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Mr. Wazir Hasan, in dealing with the construction and legal effect of the deed of gift, stated as follows in his judgment:

"The real matter therefore which arises for consideration in each particular case is the determination, first, of the thing-in which the ownership is transferred, and secondly, whether there is any condition derogatory to that ownership. If there is, it must be annulled. Now the thing transferred in the present case by Ghulam Murtaza Khan in favour of his wife Musammat Waziran is the ownership of the life-estate in and not of the *corpus* of the property There is no case before us of any condition being attached to that ownership Musammat Waziran is dead and the ownership of her life-estate which was gifted to her by her husband has come to an end."

Hyam for appellant.

Dube for respondents.

26th Feb. 1929. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by Amjad Khan, son of Salar Khan, who was the original plaintiff in the suit, against two decrees of the Court of the Judicial Commissioner of Oudh, dated the 15th of December, 1924.

The suit was brought by Salar Khan to recover possession of certain properties specified in the plaint, and mesne profits.

The title of Amjad Khan, hereinafter called the plaintiff, to two specific plots purchased by Musammat Waziran has been declared by both the Courts in India, and no question with regard to these plots arises in this appeal.

The dispute relates to proprietary shares in eleven villages.

The shares belonged to one Ghulam Murtaza Khan.

It was alleged on behalf of the plaintiff that Ghulam Murtaza Khan made a gift of the said shares to his wife, Musammat Waziran, by a registered deed, dated the 17th of January, 1905, and put her in possession of the property, which was the subject of the gift; that Ghulam Murtaza Khan died on the 6th of February, 1906, and his wife died on the 18th November, 1909, leaving her brother Salar Khan, the father of the appellant, her sole heir; and that on the death of Salar Khan the plaintiff-appellant became entitled to the property in question.

The first two defendants are the nephews of Ghulam Murtaza Khan, who, it was alleged, took possession of the properties in suit on the death of Musammat Waziran; the other defendants are transferees from the first two defendants.

The learned Subordinate Judge, who tried the suit, came to the conclusion that the above-mentioned deed of the 17th

January, 1905, was in the nature of a family settlement, that Ghulam Murtaza Khan gave to his wife one-third of the property absolutely and a life-estate only in two-thirds of the property which on her death was to revert to his heirs; and he made a decree accordingly.

The plaintiff appealed to the Court of the Judicial Commissioner of Oudh. The defendants Ashraf Khan, Basharat Khan and Nisar Ali Khan also filed an appeal.

The two appeals were heard at the same time. The learned Judicial Commissioners, though differing as to the reasons, agreed as to the conclusion, and directed on the 15th December, 1924, that the plaintiffs' appeal should be dismissed, that the defendants' appeal should be allowed and that the plaintiffs' suit should be dismissed except in respect of plots 397 and 618, which should be shown as having been decreed to the plaintiff.

The two last-mentioned plots are those as to which no dispute arises in this appeal.

On the 18th January, 1894, Ghulam Murtaza Khan made a will, and on the same day executed what was called an agreement, by which he made a declaration that he would remain in possession of the properties comprised in the will as long as he lived, but that he should not have power to alienate the same.

On the 17th January, 1905, Ghulam Murtaza Khan executed the deed, on which the decision of this case depends.

The terms thereof are as follows:—

"I am Ghulam Murtaz Khan son of Sarfaraz Khan, caste Bhatti, resident and Zemindar of Muhi-ud-dinpur, hamlet of village Jamoli, pargana Mawai Maholara, tahsil Ram Sanehighat, district Bara Banki.

"Whereas I am co-sharer of the following shares in the village comprised in Taluqa Mawai, in the above pargana and district, at present valued at Rs. 15,000 Whereas I am in possession and occupation of the same and whereas in respect of the same I have already executed a will and an agreement, dated 18th January, 1894, but as I want to avoid any difficulty to my wife in obtaining possession over the willed property after me, I, therefore, by means of this document, have made a gift without consideration of my entire property detailed below with all external and internal rights and without the exception of any right or part, to my wife Musammat Waziran, resident of Muhi-ud-dinpur, hamlet of village Jamoli, in the above pargana and district, subject to the condition that, out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5,000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest, worth Rs 10,000, she shall not possess any power of alienation but she shall remain in possession thereof for lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals, *viz*, Ashraf Khan, Basharat Khan

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and their heirs, in equal shares, and those heirs of mine shall become owners with full proprietary powers, and the own heirs of the donee lady shall not inherit the same and the donee and my aforesaid heirs have accordingly agreed and consented to this I have put the lady donee in possession of the property gifted to her, and therefore from to-day I have ceased to possess any right or claim in respect of the gifted property, and my wife, Musammat Waziran, from to-day became owner and possessor of the aforesaid property in accordance with the terms of this deed As to shares worth Rs 5,000, gifted to the said lady, she has power to choose the same from any village she likes, or if she likes, she can take shares worth Rs 5,000 from all the villages

"Wherefore these few presents by way of a deed of gift have been executed, and got registered with the consent of the reversioners, *viz* Ashraf Khan and Basharat Khan, so that it serves as an authority and be of use in time of need"

An issue was raised in the Trial Court whether Ghulam Murtaza Khan was a Hanafi Mussalman or whether he belonged to the Shiah Sect.

The learned Subordinate Judge held that Ghulam Murtaza Khan was a Hanafi Mussalman and did not belong to the Shiah Sect.

It appears from the judgment of Mr. Ashworth, one of the learned Judicial Commissioners who heard the appeal, that the decision of the learned Subordinate Judge on this issue had been impugned in one of the grounds of appeal presented by the defendants, but that the ground had not been pressed, and the appeal was decided upon the basis that the Mahomedan Law applicable was the Hanafi Law and not the Shiah Law.

In order therefore to constitute a valid gift *inter vivos* under the Mahomedan Law applicable to this case three conditions are necessary:—

(1) Manifestation of the wish to give on the part of the donor.

(2) The acceptance of the donee, either impliedly or expressly.

(3) The taking possession of the subject-matter of the gift by the donee, either actually or constructively. (See *Mohammad Abdul Ghani* v. *Fakhr Jahan Begum*[1]).

The main argument on the hearing of the appeal related to the question of what was the subject-matter of the gift by Ghulam Murtaza Khan. This depends upon the construction of the deed of the 17th January, 1905.

It was argued on behalf of the plaintiff-appellant that by the deed Ghulam Murtaza Khan transferred the *corpus* of the

1. (1922) L.R. 49 I.A. 195 at 209: I.L.R. 44 A. 301: 43 M.L.J. 453 (P.C).

property therein specified to his wife without any reservation, but subject to certain conditions of enjoyment; that if the said conditions were inconsistent with the transfer of an absolute interest in the property, the Mahomedan Law applicable to this case would give effect to the transfer, and would not give effect to the conditions; and that the deed coupled with possession given to the donee constituted a good and valid gift of all the property comprised in the deed.

On the other hand it was argued on behalf of the defendant-respondents that by the deed Musammat Waziran acquired merely a life-interest in the property comprised therein, that such interest ceased on her death in 1909, and that inasmuch as the plaintiff's only claim to the property was as heir of Musammat Waziran, he had no title thereto.

The principle on which the plaintiff relied was that where it is clear that the intention of the donor is to make a gift to the donee of the *corpus* of the property comprised in the gift, and there is a condition attached that the donee should take a limited interest or should take it for life, under the Hanafi Law the condition would be void and there would be a complete and absolute gift of the property: in other words, it was argued that if a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void, *see* Wilson's Digest of Anglo-Mahomedan Law, (1908 Edn.), para. 313.

Among other authorities reliance was placed by the learned counsel for the plaintiff-appellant upon *Mussammut Humeeda* v. *Mussammut Budlun and the Government*[2] for the purpose of showing that creation of a life-estate by means of a gift *inter vivos* does not seem to be consistent with Mahomedan usage. It was held by the Judicial Committee that there ought to be very clear proof of so unusual a transaction, and that in that case there was no such proof.

It should be noted that the facts of the cited case differ materially from the case now under consideration, inasmuch as in the present case there is before the Board the formal deed of gift, upon the true construction of which the decision must depend.

Other authorities were referred to during the course of the argument, but in their Lordships' opinion it is not necessary to refer to them in detail, for the reason that the above-men-

2. (1872) 17 W.R. 525.

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tioned principles were not disputed by the learned counsel for the defendant-respondents: their case was based on the argument that the subject-matter of the gift in the deed of the 17th January, 1905, was a life-interest only in the property and that it was not a gift to the wife of an absolute interest in the property with an inconsistent condition.

The material question then is what is the true construction of the deed. The intention of the donor is to be ascertained by reading the terms of the deed as a whole, and giving to them the natural meaning of the language used.

Their Lordships, basing their decision on the terms of the deed, are of opinion that the conclusion arrived at by the learned Judicial Commissioner, Mr. Wazir Hasan, on this part of the case is correct, and that Musammat Waziran acquired merely a life-interest in the property under the deed of the 17th January, 1905, together with a power of alienation over one-third of the property.

The donor by the terms of the deed purported to make a gift without consideration to his wife of the entire property detailed therein: he divided the property into two parts, one-third and two-thirds, with a view to giving his wife a power to alienate the one-third of the property or any part thereof by way of mortgage, sale or gift.

The words used in connection with the power of alienation point to the donor contemplating a possible alienation by his wife during her lifetime of the one-third or part thereof. It was further provided that after the death of the donee "the entire property gifted away by this document'' should revert to the donor's collaterals named therein.

It is to be noted that the provision as to reversion is not limited to the two-thirds over which the wife was to have no power of alienation, but it related to the "entire property gifted away by this document."

The "entire property" was to revert to the collaterals, but it would, of course, be subject to any mortgage, sale or gift which the wife had power to make during her lifetime in respect of the one-third part of the property mentioned in the deed.

Reading the deed of the 17th January, 1905, as a whole and giving effect to all the terms thereof, their Lordships are of opinion that it does afford clear proof that the donor intended to make and did make a gift to his wife of a life-interest only in the entire property comprised in the deed together with the

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above-mentioned power of alienation in respect of one-third of the property.

It was, however, further argued on behalf of the plaintiff that under the Mahomedan Law, which is applicable to this case, a transfer of a life-estate could not be made by means of a gift: in other words, it was argued that under the said law there could not be a transfer of any interest in property by way of gift *inter vivos* except an absolute interest.

In their Lordships' opinion, it is not necessary to express any opinion on the last-mentioned argument, because in view of the construction of the deed which their Lordships have adopted, the plaintiff-appellant is on the horns of a dilemma. If the interest acquired by Musammat Waziran was of a life-estate only, and if such an interest can be acquired under the Mahomedan Law, by way of a gift, that interest came to an end on the death of Musammat Waziran, and the plaintiff claiming as her heir has no title to the property.

On the other hand if, as argued on behalf of the plaintiff, under the Hanafi Law such a limited interest as a life-estate could not be transferred to Musammat Waziran by way of gift *inter vivos*, then Musammat Waziran acquired no interest in the property under the deed of the 17th January, 1905, and the plaintiff, claiming as her heir, can have no title to the property.

For the above-mentioned reasons their Lordships are of opinion that the plaintiff-appellant has no title to the property which is now in dispute in this appeal.

In view of this conclusion, it is not necessary for their Lordships to consider any of the other points raised in the appeal, as, for instance, the question whether there was delivery of possession as to which the learned Judicial Commissioners came to different conclusions. Their Lordships therefore will humbly advise His Majesty that this appeal should be dismissed with costs.

Upon a further application by the appellants on a point raised in reason 11 of their case, their Lordships do not think it necessary to add anything to the judgment. The point was made on an application for review in the Appellate Court, and it was held that it was not open to the appellants. Their Lordships see no reason for differing from the Appellate Court's decision in this respect.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *Watkins & Hunter.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

B. Raghavendra Row and others .. *Appellants** (*Plffs.* 1, 2, 4 *and nil*)

v.

Vobiah and others .. *Respondents* (*Defts.* 1, 2, 5, 7, 9 *to* 11 *and party respondents and L.R. of the 4th respondent*).

Raghavendia Row v. Vobiah.

Religious Endowments Act (XX of 1863)—Scheme of—Religious Endowment in Madras Presidency—Absence of exercise of control by the Board of Revenue—Absence of exercise of power of appointment of trustee by the Government or public officer—Power of temple committee over the endowment—S 3—"Public officer"—Meaning of

The scheme of the Religious Endowments Act of 1863, in so far as religious institutions in the Madras Presidency are concerned, is that, in all cases where Regulation VII of 1817 applied, or in cases where the appointment of trustee was either made by the Government of Madras or one of its officers, or where the confirmation of such appointment had to be made by Government or by its officers, such powers were transferred to temple committees, and that, in all other cases, property which was subject to the endowment was transferred to the then legally entitled trustee and the Board of Revenue had no other control over such property In order, therefore, to give jurisdiction to temple committees over a temple, they must show that the case falls under S. 3 of the Act.

Where it is found that the Board of Revenue in Madras never exercised any control over a religious endowment in the Madras Presidency nor was the power of appointment of trustee, manager, or superintendent vested in, or exercised by, the Government of Madras or by any public officer under the Government of Madras, the temple committee appointed under the Religious Endowments Act of 1863 has no right or control over such a religious endowment

The words "public officer" in section 3 of the Religious Endowments Act of 1863 mean public officer under the Government of Madras, in so far as religious institutions in the Madras Presidency are concerned, and not a public officer anywhere, even outside British India, or a public officer outside the control of the Government of Madras.

Appeal against the decree of the Court of the Subordinate Judge of Bellary in O.S. No. 3 of 1920 (O.S. No. 16 of 1921, District Court of Bellary).

P. R. Ganapathi Aiyar for appellants.

V. S. Narasimhachariar for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, J

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the temple committee of Kudligi for a declaration that the suit temple, which they say was called Hude Kampli Devaru, is subject to the control of the plaintiffs, for directing the

*Appeal No. 108 of 1921. 18th July, 1929.

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defendants to return to the manager, who they allege was appointed by them, the properties of the temple, for accounts and other reliefs. The contesting defendants deny the plaintiffs' claim. Their case was that Kampli Devaru had no temple, that they had no concern with Kampli Devaru temple at Hude and the inam, that the right of appointing the *pujari* is in Mesa Naiks, that Kampli Devaru idol is permanently in Mysore territory and that the Court has no jurisdiction.

The suit was instituted in 1911. It came up twice to the High Court as the suit was decided on preliminary questions. The Subordinate Judge who tried the suit after both orders of remand has found that the Kampli Devaru is a Narasimha saligrama image which is the deity of the Mesa Naik caste, that it has no permanent shrine, that it is always on tour and that it has a temple and inam at Hude. He finds that the temple committee has or had no jurisdiction over this temple, that the temple was never under the control of the Board of Revenue and that the power of appointment of trustees was at least from 1800 to 1890 exercised by the Mysore Government and that no Dharmakarta was ever appointed or confirmed by the Board of Revenue, and dismissed the suit. Hence the appeal.

It is clear from the evidence that in 1810 the previous trustee or *pujari* was dismissed by the Dewan of Mysore and a fresh trustee was appointed. The order of the Dewan is on page 30, Ex. P. (Printed documents in Appeal No. 186 of 1914). It refers to the dismissal of the first *pujari's* grandson, Dosa Gopaya and the appointment of Dasaya. Then it proceeds as follows:

> "In future if to instal the patta of Gosi God, Kampli God or any other God they should come and inform you as well as the sircar of it; a Hachadu and Paga should be presented from the sircar and when the relatives come and inform, you should have the patta installed, when you instal patta, you shall receive the najar usually payable therefor by them to the sircar When making the patta installation, careful enquiry should be held in the presence of respectable persons of the place and after a decision in Hachadu and Paga should be presented from the sircar and the patta should be conferred."

This is dated 28th March, 1810. The first person appointed continued in office until 1853. His son was the second *pujari* from 1853 to 1874. It appears, that in accordance with the order of 1810, he was recognised as the trustee and the customary honours were given to him. Then his son Obaya was the *pujari* from 1874 to 1879 and was succeeded by his elder brother from 1879 to 1907. In 1907 disputes arose as to the successor. Several members of the community did not want the

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sons of Peddanna to be appointed owing to the alleged immorality of their mother, and there were various proceedings, civil and criminal, in the Courts of Mysore. The Subordinate Judge has found on the evidence that for nearly a century no sort of control was exercised by the Board of Revenue or by any officials in British India as regards the management of the temple and the appointment of trustees, that till 1890 the Mysore Government officials were informed of the persons who were selected by the community as trustees and they were recognising them, that in 1890 the Dewan thought the Mysore Government did not concern itself with this endowment as it was not one of the temples which had any grant from or subject to the control of the Mysore Government. Therefore, the question for determination in this case is whether, on these facts which the Subordinate Judge has found and which we see no reason to differ from, the temple committee has got any right in the matter. The Subordinate Judge has given reasons for holding that the temple committee has no right. He deals with this question in paragraph 25 of the judgment onwards. We think that the decision of the Subordinate Judge on this point is right.

Act XX of 1863 was an Act passed for the purpose of enabling the Government of India to divest itself of the management of religious endowments. It begins by saying:

"Whereas it is expedient to relieve the Board of Revenue, and the Local Agents, in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX of 1810, of the Bengal Code and Regulation VII of 1817, of the Madras Code, so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof; or involve any connection with the management of such religious establishments."

Section 3 enacts that

"In the case of every mosque, temple or other religious establishment to which the provisions of either of the Regulations specified in the preamble to this Act are applicable, and nomination of the trustee, manager or superintendent thereof, at the time of the passing of this Act, is vested in, or may be exercised by, the Government or any public officer, or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided."

The provisions are *inter alia* for the appointment and constitution of temple committees as provided for by section 7. Section 4 enacts that

"In the case of every such mosque, temple or other religious establishment which, at the time of the passing of this Act, shall be under the

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management of any trustee, manager or superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager or superintendent, all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue or any local agent, and belonging to such mosque, temple or other religious establishment, except such property as is hereinafter provided;''

and on such handing over, it enacts that the power and responsibility of the Board shall cease. It has been found by the Subordinate Judge and we accept the finding that the Board of Revenue never exercised any control over this endowment nor was the power of appointment of trustee, manager or superintendent vested in or exercised by the Government of Madras or by any public officer under the Government of Madras. The contention of Mr Ganapathi Aiyar for plaintiffs is, that "public officer" does not mean a public officer under the Government of Madras, but means any public officer wherever a public officer may exercise his function. He goes to the length of arguing that a public officer outside British India would also be a person in the contemplation of section 3 and that any institution, the appointment of whose trusteeship is vested in or controlled by any public officer whether in British India or outside, would fall under Act XX of 1863 and give jurisdiction to the temple committee appointed under section 7. I am unable to agree with this contention. I find it difficult to see how the Act can apply so as to give jurisdiction to the Board of Revenue or the temple committee in cases where a public officer subject to the control of another Government, presidency, or province has been exercising the powers of appointment or control. The words "public officer" I think must, having regard to the other sections of this Act and to the provisions of Regulation VII of 1817 mean, public officer under the Government of Madras and not a public officer anywhere, even outside British India or a public officer outside the control of the Government of Madras. I have already referred to the preamble and it refers to cases to which Regulation VII of 1817 applied, and before section 3 can be invoked there should be two conditions satisfied, namely, that not only the Regulation VII of 1817 should be applicable but also that at the time of the passing of the Act the nomination of the trustee, manager or superintendent should be vested in or exercised by the Government or any public officer or such nomination should be subject to the confirmation of the Government or public officer. In the preamble to the Regulation VII of 1817 we find reference to the Provinces immediately dependent on

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the Presidency of Fort St. George. Section 2 vests in the Board of Revenue the general superintendence of all endowments, etc., in the several provinces dependent on the Presidency of Fort St. George. Section 3 says that it is the duty of the Board of Revenue to take measures to ensure that religious establishments are properly maintained and that other trusts are properly carried out. Section 7 enables the Board of Revenue to have local agents. Section 8 says that the Collector shall be one of the local agents and powers will be given to the Government to appoint other local agents if it so desires. Section 11 says that the local agent shall report to the Board of Revenue the vacancies and casualties as they may occur and other particulars as to whether the line of descent is by hereditary right or by election. Section 12 refers to cases where the nomination is vested in Government or public officer and section 13 says what is to be done on the receipt of the report. It is clear from a perusal of the various sections referred to, that the Madras Regulation VII of 1817 was confined to the Government and territories administered by the Government of Fort St. George and the "public officer" there was a public officer subject to that Government and not any public officer, and, in construing section 3, I think it is clear that we must take "public officer" there to be a public officer who was exercising his functions under Regulation VII of 1817. Section 4 simply says that, where section 3 does not apply, *i.e.*, where the Government would not have any power to transfer the management to local committees, any endowment which then belonged to such trust shall be made over to the trustee in charge of the endowment and the Board shall divest itself of all concern in the management. The scheme of this Act, therefore, is that in all cases where Regulation VII of 1817 applied or in cases where the appointment of trustee was either made by the Government of Madras or one of its officers, or where the confirmation of such appointment had to be made by Government or by its officers such powers were transferred to temple committees; in all other cases property which was subject to the endowment was transferred to the then legally entitled trustee and the Board of Revenue had no other control over such property. It is therefore clear from the scheme of this Act that to give jurisdiction to temple committees they must show that the case falls under section 3. Otherwise it is difficult to see how a temple committee can either appoint a trustee or file a suit like the present one requiring property to be handed over to the trustee whom they

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had no power to appoint. I am therefore of opinion that the decision of the Subordinate Judge is right as the temple committee had no right to institute this suit.

The appeal fails and is dismissed with costs of respondents 1, 5 and 6.

Pakenham Walsh, J.—I agree.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Amirtha Nadan and another .. *Appellants* (Petitioners-Defendants)*

v.

Innasi Muthu Nadan .. *Respondent (Respondent-auction-purchaser and Plaintiff).*

Amirtha Nadan v. Innasi Muthu Nadan.

Village Courts Act (I of 1889), S 66—Decree passed by Village Munsif—Transmission to District Munsif for execution—Jurisdiction of latter to execute by attachment and sale of judgment-debtor's immoveable property

A District Munsif to whom a decree passed by a Village Munsif has been transmitted for execution has jurisdiction to execute it by attachment and sale of immoveable property belonging to the judgment-debtor, as if the decree was one passed by him on the original side of his Court.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin in A.S. No. 175 of 1927 preferred against the order of the Court of the District Munsif of Koilpatti, dated 7th May, 1927 and made in E.A. No. 420 of 1927 in Civil Suit No. 53 of 1923 on the file of the Village Munsif's Court, Lingampatti, Koilpatti Taluk.

K. S. Ramabhadra Aiyar for appellants.

A. Narasimhachariar for respondent.

The Court delivered the following .

Wallace, J.

JUDGMENTS. *Wallace, J.*—The facts necessary for the disposal of this C.M.S.A. are as follows:—The respondent obtained a money decree in C.S. No. 53 of 1923 in the Village Court of Lingampatti against the appellants. That decree was sent for execution to the District Munsif's Court of Koilpatti and received there on 13th February, 1925. E.P. No. 539 of 1925 presented in that Court was dismissed for failure of prosecution. A fresh E.P. No. 383 of 1926 was put in asking for attachment and sale

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*C.M.S.A. No. 203 of 1927. 26th April, 1929.

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of immoveable property. That was treated by the District Munsif's Court as an execution petition on the original side and immoveable property was attached and sold. The sale was confirmed on 22nd February, 1927. The appellants applied under Order 21, Rule 90, Civil Procedure Code, to the District Munsif's Court to set aside the sale because of irregularities and the sale was set aside. The respondent appealed to the Sub-Court, Tuticorin, which set aside the order of the District Munsif and maintained the sale. The appellants have come up here in Second Appeal.

Clearly no Second Appeal lies and the appeal is not maintainable as such. The appellants asked us to treat this as a civil revision petition raising a question of jurisdiction, *viz*, whether the District Munsif had any jurisdiction to execute the decree on the original side at all, and we have had this point, which is not free from difficulty, argued before us. It was taken for the first time in this Court.

The decision of the point rests on the interpretation of section 66 of the Village Courts Act (I of 1889). The section as it stands empowers the District Munsif to whom a Village Court decree is transmitted for execution to execute it "as if it were a decree passed by himself." This phrase is ambiguous. It may mean, execute the decree as if this particular decree was a decree signed by him and not by the Village Court, or, it may mean, execute the decree with all the powers of execution which a District Munsif possesses to execute any decree passed by him. The first meaning would restrict the execution to the manner under which a Small Cause decree can be executed since the decree on the face of it is a Small Cause decree. The second meaning would allow the decree to be executed also in the manner in which an original side decree is executed. The appellants contend in favour of the first meaning and the respondent in favour of the second. The appellants refer to the definition, given in section 5 of the Act, of the words "District Munsif." That definition originally was "The District Munsif within the local limits of whose jurisdiction the village is situate." That definition was amended by section 4 of Act II of 1920 by the addition of two provisos, the second of which is:

> "Provided further that if in any area the District Munsif does not exercise Small Cause jurisdiction and a separate Court of Small Causes has been established the Judge of such Court shall be deemed to be the District Munsif"

The appellants contend that that implies that "District Munsif" as used in the Act is restricted to the Small Cause

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side of the District Munsif's Court, since provision was thought necessary for the cases where in any district or locality there is no District Munsif exercising Small Cause powers. There is considerable force in that contention, coupled with the obvious fact that the decrees of Village Courts are always in substance Small Cause decrees.

But the respondent refers us to section 51 of the Village Courts Act which runs thus:

"Subject to the provisions of sections 66 and 67, no judgment-debtor shall be arrested and no immoveable property attached in execution of a decree of a Village Court."

This clearly implies that the power of attaching immoveable property in execution of a Village Court decree—a power which no Small Cause Court has—is somehow inherent in or conferred by section 66, and that can only be so if the phrase "may execute as if it were a decree passed by himself" covers execution not merely on the Small Causes Side but on the Original Side as well. The appellants' argument, as their Advocate realises, implies that a Village Court decree can never be executed by attachment of immoveable property, although section 51 says that it may, and his rejoinder to section 51 is merely to say that section 51 must be regarded as a dead letter, a view which he can hardly expect us to adopt unless the opposite view is wholly untenable. Section 51 to my mind clearly permits, in conformity with its tenor, attachment under section 66 of immoveable property in execution of a Village Court decree, and an application for execution based on that section must be on the Original Side because it asks for reliefs which can only be given on the Original Side. Section 66 therefore must be read as empowering a District Munsif to execute a Village Court decree as if it were an Original Side decree passed by himself. The second proviso to the definition of "District Munsif" under section 5 is evidently intended to deal with cases where the decree-holder wishes to execute the Village Court decree as a Small Cause decree in a locality where the District Munsif does not possess Small Cause powers, and has therefore to present it in a Court which is the Small Cause Court for that locality.

I hold that section 66 gives the District Munsif jurisdiction to receive such execution petitions on the Original Side and to execute them on that side. Therefore there is no lack of jurisdiction. This also decides the second point of jurisdiction raised by the appellants, *viz*, that the Lower Court had no jurisdiction to entertain an appeal against the order of the District Munsif setting aside the sale.

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I therefore dismiss the C.M.S.A. with costs.

Madhavan Nair, J.—I have had the advantage of reading the judgment of my learned brother and I agree with it. The question for decision is whether a decree passed by a Village Munsif, *i.e.*, obviously a decree of a Small Cause nature, transmitted for execution to the District Munsif, may be executed by the latter by attachment and sale of immoveable property. The contention for the appellant is that the District Munsif has no such power and that he can execute the decree only in the same way as he would execute a Small Cause decree passed by himself. According to section 66 of the Village Courts Act, a District Munsif to whom a decree passed by a Village Court had been transmitted for execution may execute it "as if it were a decree passed by himself." The expression "as if it were a decree passed by himself" may mean (1) as if it were a Small Cause decree passed by himself, or (2) as if it were a decree passed by him on the Original Side, since the District Munsif has jurisdiction to pass both kinds of decrees. It is this ambiguity in the meaning of this expression that causes difficulty in this case. The appellants' argument that the District Munsif can execute the decree in question only in the same way as if it were a Small Cause decree passed by him is based on the definition of the term "District Munsif" in the Village Courts Act as amended by Madras Act II of 1920 (*see* section 5, Proviso 2) which is as follows:

> "Provided further that if in any area the District Munsif does not exercise Small Cause jurisdiction and a separate Court of Small Causes has been established the Judge of such Court shall be deemed to be the District Munsif."

The argument has considerable force and is almost convincing; but it entirely overlooks section 51 of the Village Courts Act which says:

> "Subject to the provisions of sections 66 and 67, no judgment-debtor shall be arrested and no immoveable property attached in execution of a decree of a Village Court."

This section clearly implies that under section 66 of the Village Courts Act, the District Munsif in executing a decree passed by a Village Court transmitted to him for execution can attach immoveable property of the judgment-debtor. Having regard to this section, the second proviso of the definition of "District Munsif" contained in section 5 is, as pointed out by my learned brother, "evidently intended to deal with cases where the decree-holder wishes to execute the Village Court's decree as a Small Cause decree in a locality

where the District Munsif does not possess Small Cause powers and has therefore to present it in a Court which is the Small Cause Court for the locality."

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If the Legislature intended by the amended definition of "District Munsif" to show that the District Munsif in executing the Village Court's decree transmitted to him for execution, should execute it only as if it were a decree passed by him on the Small Cause side, then it seems to me that it would have omitted section 51 of the Act altogether.

I agree in the order proposed by my learned brother.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Ramanujam Naidu .. *Petitioner* (Accused).*

Ramanujam Naidu, *In re.*

Motor Vehicles Act (VIII of 1914), S 4, Part (a)—Police Officer not engaged in regulating traffic—Power to stop the driver of motor bus—When can be raised

A Police Officer who is not engaged in regulating traffic has got the power, under section 4, Part (a) of the Motor Vehicles Act, to stop the driver of a motor bus on the ground that the bus is overloaded and that he wishes to inspect it and check the license.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 and section 107 of the Government of India Act, 1915 praying the High Court to revise the judgment of the Court of the Joint Magistrate of Kumbakonam in Criminal Appeal No. 49 of 1928 preferred against the judgment of the Court of the Stationary Second Class Magistrate of Kumbakonam in Calendar Case No. 332 of 1928.

Watrap S. Subramania Aiyar for petitioner.

K. Venkataraghavachari for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—These proceedings under the Motor Vehicles Act were instituted against the petitioner on a report by Head Constable No. 1346 to the Sub-Inspector of Kumbakonam. In the charge framed against him it was alleged that he drove Bus No. 333 in Kaluthai Tope Road, Kumbakonam, and "instead of stopping his bus on seeing Bus No. 416, which came in the opposite direction, and without caring for the regulation under which the C.P.I. (the Circle Inspector) asked him

*Cr. Rev. Case No. 115 of 1929. (Cr R.P. No. 97 of 1929). 29th July, 1929.

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to stop, drove very fast." There are two separate actions imputed in this charge, the first being that the accused failed to stop his bus on seeing Bus No. 416. I understand it to be the rule that, when two motor buses are about to pass each other, it is the duty of one of them to stop, presumably in the interests of safety. It has been admitted, however, by the prosecution in this case that, on the occasion in question, it was the duty of the diver of the other Bus No. 416 to stop his vehicle and accordingly the petitioner was found not guilty of failing to observe this rule.

There remains the charge that he failed to stop when the Circle Inspector asked him to do so. It has been contended on behalf of the petitioner that, under section 4 of the Motor Vehicles Act, a driver can only be stopped by a police officer who is engaged in regulating traffic. This, I think, is so clearly against the language of the section as not to merit further discussion. Part (*a*) of the section requires that a driver should stop in three sets of circumstances: firstly, that traffic may be regulated; secondly, that a name and address may be obtained with a view to a prosecution, and, thirdly, for the purpose of enforcing any of the provisions of the Act. The allegation by the prosecution is that the bus was overloaded and that the Inspector wished to inspect it and to check the license. These, I think, were reasons for stopping it coming under the third and last category above—the enforcement of the Act.

There remains the question of fact whether, before the petitioner's bus passed the bus in which the Inspector was seated, he made a sign to the petitioner to stop which the petitioner saw and disregarded. I should in ordinary circumstances have accepted the evidence of the two police witnesses were there not considerable difficulty in the way of such a course. The report of the Head Constable, which certainly ought to contain the elements of the offence charged is, as I read it, that the petitioner's bus ought to have stopped when passing the other bus and that it not only failed to do so but did not stop in spite of the order of the Circle Inspector. I am quite unable to extract from this report the definite statement that, irrespective of the rule requiring the stopping of the bus upon meeting the other bus, the Circle Inspector signalled to the petitioner to stop before the passing took place. This is also the impression which I get from the examination-in-chief of both the Head Constable and the Circle Inspector. The Head Constable says: "Bus Tan. No. 333 driven by the accused passed and it was not stopped even when I and the Inspector asked him to do so."

In chief examination the Inspector says: "It did not stop when it passed my bus" and it was only elicited from him in cross-examination that hands were put up to stop the bus. The driver and the conductor of Bus No. 416 were examined as D.Ws. 1 and 2 and one was unable to state whether, before the accused passed Bus No. 416, the Inspector raised his hand, whereas the other denied that such an action took place. There is no doubt that, after the petitioner had driven his bus by, the police officers called out to him to stop and he eventually stopped. But inasmuch as the conviction is based on the finding that the petitioner received and disregarded the signal to stop before passing the other bus I am unable to agree that the evidence supports it.

I allow the petition, set aside the conviction and direct that the petitioner be acquitted and the fine, if paid, be refunded.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

P. L. S. Firm, Colombo, through its partner
P. L. S. Lakshmanan Chetti .. *Appellant** (*Plff.*)
v.
M. R. M. S. Sulaiman .. *Respondent* (*2nd Deft.*).

Civil Procedure Code (V of 1908), S 13 (b)—Foreign judgment—Suit on promissory note or hundi in the District Court of Colombo—Non-appearance of defendant—Affidavit filed by plaintiff in terms of the plaint—Decree nisi under section 85 of the Ceylon Civil Procedure Code—If can be said to be a decision on the merits of the case

A decree *nisi* passed by the District Court of Colombo, under section 85 of the Ceylon Civil Procedure Code, in a suit on a promissory note or a hundi where the defendant is *ex parte*, is not a decision on the merits of the case within the meaning of S 13 (*b*) of the Civil Procedure Code. The fact that an affidavit, which was a reduplication of the plaint, was filed in the Court at the time of the passing of the decree *nisi* by the Court does not make it a decision on the merits.

Keymer v *Visvanatham Reddi*, (1916) L.R 44 I.A 6: I.L.R 40 Mad 112 32 M L J 35 (P C), *Mahomed Kassim & Co* v *Seeni Pakir Bin Ahmed*, (1926) I.L R. 50 Mad 261 · 52 M L.J. 240 (F.B) and *Arunachalam Chettiar* v. *Mahomed Salihu Marakkayar*, (1927) 26 L W. 803 referred to

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O.S. No. 116 of 1924.

B. Sitarama Rao, K. Rajah Aiyar and *K. S. Rajagopalachariar* for appellant.

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*Appeal No 47 of 1928. 26th March, 1929

P. L. S. Firm, Colombo v. Sulaiman.

M. Patanjali Sastri and *K. Umamaheswaran* for respondent.

Brook Elliot amicus curiae.

The Court delivered the following

Odgers, J

JUDGMENTS. *Odgers, J.*—These appeals, Appeal No. 349 of 1924 and Appeal No. 47 of 1928, were originally heard by myself and Curgenven, J., but owing to the latter's illness before he left the Court last year we were unable to deliver our judgments. In the meantime an informal application was made to me which is now put in the form of a petition that we should ask Mr. Brook Elliot, a member of the Ceylon Bar, to either appear as an *amicus curiae* or as a witness to help us in the elucidation of the Ceylon Procedure in this case as contained in the Ceylon Procedure Code. We have given very careful consideration to this request and we are indebted to Mr. Brook Elliot for so readily placing his services and knowledge at our disposal. But we consider that the only way in which Mr. Brook Elliot could be of any real assistance would be if he were asked his opinion as to the very question that we have to decide. An expert in foreign law is called, as I understand it, to state what the law of a foreign country on a particular point is; an Advocate of the Scottish Bar is often called as a witness in the English Courts to explain the law of Scotland on any particular point that arises. But in this case we have the law laid down for us in a particularly elaborate manner in the Ceylon Civil Procedure Code and it appears to me that it is our duty to interpret that Code as best as we can and that we are not entitled to rely on any outside opinion, however eminent, as to the interpretation of that Code.

The plaintiff brought O.S. No. 116 of 1924 in the Court of the Subordinate Judge of Sivaganga. On the 16th December, 1924, an *ex parte* decree was passed in the suit on a foreign judgment of the District Court of Colombo against defendants 1 and 13 in the suit. On the 13th March, 1926, 13th defendant applied to set aside the *ex parte* decree and succeeded. The 2nd defendant is now the contesting defendant before us. The learned Judge on this application held that the 2nd defendant only became aware of the decree on the 16th February, 1926 and that his application was therefore within time. We were at first inclined to go into the facts to see if the learned Judge's order could be sustained on this point, but in this case the most important question that arises is as to whether this is a decision on the merits. On the 30th May, 1917, the suit was filed. We have the Journal under section 105, Ceylon Civil Procedure

Code, printed. It is contended that because an affidavit is apparently put in, the decision is one on the merits although the defendant was *ex parte*. The suit was against 14 defendants of whom only the 1st and 13th defendants were *ex parte*. On the 7th July, 1921, Mr. Kondayya moved for an *ex parte* trial as against the 1st and 13th defendants. This was allowed and the trial fixed to the 15th July. On the 19th September, 1921 Mr. Kondayya filed an affidavit and moved that decree *nisi* be entered. Decree *nisi* was issued on the 11th November, 1921. The affidavit was filed on the 15th September, 1921 and sets out the fact that certain promissory notes and a cheque were dishonoured and that the defendants are jointly and severally liable in the sum of Rs. 9,500 and odd. The Journal states that on the 19th September, the day fixed for the hearing, the plaintiff appeared and that the 1st defendant and the 13th defendant did not appear though they were duly served as by the affidavit of the process-server appears. Reference must be shortly made to the provisions of the Ceylon Procedure Code. The chapter relating to default of appearance is Chap. XII. Section 85 says:

"If the defendant fails to appear on the day fixed for his appearance and answer, or if he fails to appear on the day fixed, for the subsequent filing of his answer, or for the filing of the replication, or on the day fixed for the hearing of the action, and if the Court is satisfied by affidavit of the process-server stating the facts and circumstances of the service or otherwise, that the defendant has been duly served with summons, or has received due notice of the day fixed for subsequent filing of answer, or of replication, or of the day fixed for the hearing of the action, as the case may be, or if the defendant shall fail to file his answer on the day fixed therefor, and if on the occasion of such default of the defendant the plaintiff appears, then the Court shall proceed to hear the case *ex parte* and to pass a decree *nisi* in favour of plaintiff in the Form No. 22 in the second schedule hereto or to the like effect, and shall thereupon issue to the defendant a notice of such decree Such notice shall be served personally unless the Court, for sufficient reasons to be assigned by it, direct some other mode of service"

Reference may also be made to the words of section 87:

"No appeal shall lie against any decree *nisi* or absolute for default."

Section 90 says:

"In the case of an action where there are more defendants than one, the Court shall not be obliged to pass a decree for default against a defendant for failing to appear at a stage of the action, provided that one defendant at least appears at that stage against whom the action must proceed."

It is alleged that the affidavit printed at page 3 of the appellant's documents was used at the hearing *ex parte* and that that constitutes a decree on the merits. We have no judgment in the case and the only affidavit referred to in the order quoted above is that of the process-server. Under section 85 it would seem that the Court has no option but to give a decree for the

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plaintiff, the defaulting defendant being left to his remedy of moving to set aside the decree *nisi* if he can. Chapter XII makes no reference to affidavit evidence which is only by section 179 to be allowed by the Court for sufficient reason. The affidavit relied on does not appear in the Journal and it is not explained under what provision of law it has been used. It may be that it is the practice of the Colombo Courts to use affidavits of this kind before ordering the issue of the decree *nisi*, but in the absence of any evidence on the point it seems to me that the affidavit in question cannot be relied upon to make this a decree on the merits. There is no judgment whatever.

Another possible explanation is that this suit, though begun as a regular suit, and we know that all the defendants but two originally appeared and filed answers, was, after the dismissal of the suit against them, converted into a summary suit and it will be remembered that in summary suits an affidavit is required.

Another question raised in this appeal has been already referred to, *viz*, whether these defendants had notice of this particular decree. The second defendant states that he was not served with any summons and was only aware of the decree passed against him on the 16th February, 1926. This becomes important in considering whether he was within time in making his application to set aside the *ex parte* decree. He further says he was employed in Colombo for the last two years and came to Tondi, the village in question, on the 28th of January, 1926. The agent of the plaintiff on the other hand says that this defendant came to the village of Tondi a few days prior to 28th January, 1926. The Court amins came to Tondi on the eve of his marriage, the defendant remaining in concealment. A resident of Tondi, Madar Shaik Ali, says that the marriage of this defendant was celebrated secretly because even at the end of January he was aware of the warrants out for his arrest. There is a conflict of evidence about this matter and it is evident that the amins found themselves in an hostile atmosphere in this village and wired to the Subordinate Judge to know what they were to do as the defendant was absconding inside the house. They asked for police bandobust from Tiruvadani, as the outpost of Tondi did not seem to be available or willing to help them. It is of course the law that the defendant must know exactly what decree, and for what amount, is being executed against him and while it is quite likely that he knew that the amins were in the village to execute this particular decree it is possible that, as he was a man in involved circumstances, he was not sure what particluar decree

it was that was sought to be executed. This question really becomes of no importance in the view that I have taken that this decree is not one on the merits.

This is admittedly a decree for default and not a decree on the merits, *c.f.*, Ceylon Civil Procedure Code, sections 703 and 708. Therefore it may be argued with reason that an affidavit is not a distinguishing mark of a regular hearing on the merits and that exactly the same materials are placed before the Court in a case of this kind as in the summary procedure. There is also the fact that there is no judgment but merely a decree in this matter which supports the view that it is not a decree on the merits. In this view I am of opinion that this appeal fails and must be dismissed with costs.

While this judgment was under consideration we have been referred to two reported Ceylon decisions. The first is Vol. 6 of Notes of Cases by Mr. K. Balasingam and is at page 17 of that volume. The learned Judges there held that at an *ex parte* hearing it was necessary for plaintiff to give such evidence of the material averments as would enable the Court to pass a decree. The Judges held there had been no hearing at all as all the plaintiff said was "I have actually sustained the damages claimed and nearly half the claim was for pain of mind and body." It was also doubtful if such damages could be recovered. The other case is reported in 3 N.L.R. (Ceylon), page 34 and was a case of 1897. It holds that the plaintiff must make out a *prima facie* case and that the Judge is not bound to pass a decree till he is satisfied. He may grant an adjournment to enable plaintiff to repair the defects in his evidence and which may seem a strange proceeding to us here. The Judges refer to the old practice of allowing the defaulter defendant to appear and examine plaintiff in order to make the Court dissatisfied with the plaintiff's case. This is no longer allowed but the Court must still be satisfied that plaintiff has a case. This is reasonable. Suppose *A* sued *B* for the price of a coat and claimed Rs. 10,000. The case is *ex parte*. It may well be that the Court would not be satisfied without proof of the truth of the plaintiff's claim, *i.e.*, that the coat is worth so much. I am not satisfied that this would make it a decree on the merits. The Ceylon case cited seems peculiar as there seems to have been a judgment. We have none here and in my opinion this case has no bearing on the present.

Wallace, J.

Wallace, J.—This appeal is against the decision of the Lower Court dismissing as against the 2nd defendant the plain-

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tiff's suit, and the plaintiff appeals. The suit is based on a foreign judgment, namely, the decree in O.S. No. 47816 of 1917 on the file of the District Court, Colombo. It was a decree based on certain promissory notes and hundis. The plaintiff has sued upon this decree in the Court of the Subordinate Judge of Sivaganga to recover the sum of Rs. 15,000 now said to be due under it.

The first and, to my mind, the most important contention is whether that foreign judgment satisfies the requirements of section 13 (*b*) of the Civil Procedure Code; that is, is it a judgment given on the merits of the case? The Subordinate Judge has held that it was not and on full consideration I agree with him.

The Journal, which is the diary in the suit O.S. No. 47816 of 1917 maintained in the District Court, Colombo, is exhibited and discloses the following facts. The present respondent was one of the several defendants there, he being No. 13. All the defendants to the suit were served and several appeared on the 12th August, 1918, the date fixed for the trial, but this defendant did not. The District Court proceeded to try the case against those served, reserving the right to proceed against those absent, a procedure permitted by the Ceylon Civil Procedure Code. The trial against those present was held up till a connected case was disposed of in November, 1919 and was finally dismissed on the 27th May, 1921, owing to the plaintiff having taken no steps. On the 7th July, 1921, the plaintiff appeared to ask for the case to be proceeded *ex parte* against those defendants who did not appear including the present respondent. After two adjournments, the case was taken up on the 19th September, 1921, and the entry in the Journal (the meaning and implication of which we have to consider) is

"Mr. C T Kondayya (that is, the plaintiff's proctor or vakil) filed affidavit and moves that decree *nisi* be entered in terms of the prayer of the plaint against the 1st and 13th defendants"

and the Court entered decree *nisi*, and on the 11th November, 1921, notice of the decree *nisi* having been affixed to the defendant's residence and no appearance made, a decree absolute was passed. It is on that decree absolute that the present suit is based.

The question is whether the entry of the 19th September, 1921, imports that the case was heard and judgment given on the merits. The procedure followed is, it is conceded, that laid down for the trial of regular suits by Chapter XII of the

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Ceylon Civil Procedure Code. Section 85 is the section particularly applicable. On the non-appearance of the defendant, the Court shall, if the plaintiff appears, "proceed to hear the case *ex parte* and pass a decree *nisi*." Does the phrase "shall proceed to hear the case *ex parte*" necessarily mean that the case was decided on the merits? I am unable to hold so. Hearing a case is merely attending to a case, taking it up for further proceedings. Dates are fixed for the "hearing of an action" after the pleadings have been put in. *See* sections 84 and 85. "Hearing" appears to me nothing more than taking the case up for trial. Even a decree *nisi* cannot be passed until the case is taken up for hearing and heard. That it does not necessarily imply the taking of evidence is indicated by the mandatory character of the section—"the Court *shall* pass a decree *nisi*." That the passing of a decree for default is mandatory is clear from section 90, which enacts that if all the defendants in a case do not fail to appear but some do appear, then the decree for default is not immediately obligatory on the Court. The present case is obviously governed by section 90. The decree for default against those defendants who had not appeared was postponed until the trial of the case against those defendants who had appeared, was closed. The reasonable interpretation of section 85 is that the passing of a decree *nisi* is not a decision on the merits of the case but is a penalty for default of appearance.

It is argued that the fact that the plaintiff's proctor is said to have filed an affidavit, which is said to be the affidavit printed on page 3 of the documents before us and appears to be a reduplication of the plaint, implies that the Court called for evidence and accepted the affidavit as evidence on which to base its decree. We are asked to infer from the facts that the affidavit was presented, that the Court called for it and used it as evidence, but the provisions of the Ceylon Code lend no support to this proposition. The general section relating to proof by affidavit is section 179, which says that the Court may, for sufficient reasons, order that any particular fact be proved by affidavit. Section 437 clearly implies that, except in an action of summary procedure, affidavits which are to be evidence in a case must be called for by the Court on specific order. We are not shown anything here to indicate that the Court did so order evidence to be given by affidavit. There is nothing to show that the Court called for this affidavit or used it as evidence. There is in fact, and it is a strong point against the plaintiff,

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no judgment or statement of reasons for the decree, nothing to show that the Court directed any attention to the merits of the case. When the Court has taken evidence and decides on evidence, it must write a judgment. *See* sections 184 and 187.

There are other indications that a decree *nisi* passed under section 85 and a decree absolute which follows under section 86 are not decrees passed on the merits. For example, sections 86 and 87 speak of each of these decrees as decrees for default. Presumably this is of a deliberate purpose. No appeal against either is allowed (*see* section 87) and if the decision was on the merits, one would naturally expect an appeal to be allowed. Again, section 87 provides for these decrees being set aside by motion, but what the Court has then to consider is not the merits of the controversy in the suit but the merits and demerits of the defendant's failure to appear. So in the present case, the decree *nisi* was evidently passed not on the affidavit but on the defendant's failure to appear. It is clear that the procedure in Chapter XII does not anywhere contemplate a decision upon the merits of the matters in issue in the suit. The form of the decree *nisi* No. 22 affords no hint that the merits of the matters in issue in the suit have been considered. It is a decree purely because of the default of appearance.

The plaintiff has based an argument on the wording of the summons issued to the defendant in a regular suit procedure as contrasted with that issued in an action of summary procedure on a liquid claim. These are Forms Nos. 16 and 19, respectively, found at the end of the Ceylon Civil Procedure Code. Form No. 16 says that in default of appearance "the action will be proceeded with and heard and determined in your absence." Form No. 19 says that in default of appearance, plaintiff will be entitled to obtain a decree. But these forms must be read in conformity with the Code itself and there is no reason why we should read more into the words "hear and determine" than give the case a hearing and bring it to an end.

I am satisfied for the above reasons that there was in the District Court, Colombo, no decision on the merits. The point is not without authority in this Court. A very similar case is reported in *Arunachalam Chettiar* v. *Mahomed Salihu Marakkayar*,[1] where Kumaraswami Sastriar and Curgenven, JJ., held that the decision was not on the merits, following the Full

1. (1927) 26 L.W. 803.

Bench judgment of this Court in *Mahomed Kassim & Co.* v. *Seeni Pakir Bin Ahmed*[2] and the Privy Council ruling in *Keymer* v. *Visvanatham Reddi.*[3]

As the suit fails on this point, it is unnecessary to go into the other points raised by the plaintiff, namely, whether he is entitled to plead here that the Lower Court was in error in setting aside the *ex parte* decree which he had obtained against the respondent and whether the respondent's application to set aside that *ex parte* decree was out of time.

I may just briefly note here that an application was made to us by the appellant to examine, for the purpose of elucidating the procedure in the District Court of Colombo, a learned Barrister of this Court who has practised there, but I really do not see how an examination of this gentleman would assist us to decide the present case. Even if he were able to say that in certain cases the District Court did adopt a procedure which involves a decision on the merits, it is incredible that he will be able to say that it was the inveterate habit of that Court to decide all such cases on the merits and that there could not be any exception to that practice, that in fact the District Court of Colombo and every District Judge in it invariably, as a matter of uniform rule, recorded decisions on the merits in all cases under section 85. If the appellant had wished to produce before us information which would enable us to decide in a clearer fashion what the exact procedure in the District Court of Colombo was and what the meaning of the particular sections of the Civil Procedure Code cited before us is, as laid down by the Supreme Court of Ceylon, it would not have been difficult for him to produce before us reported rulings of the Supreme Court on the points at issue in the case, but no attempt has been made to do this when the case was argued at the bar.

Since that argument, appellant has by letter called our attention to two reported cases of the Supreme Court of Colombo. It is not necessary for us to post the case for further argument on these, as they do not seem to me to arise from his point. From the case reported in *Mr. Balasingham's Notes of Cases*, Vol. 6, page 17, it appears that there must be an *ex parte* hearing of the plaintiff's case before a decree *nisi* can be passed. It was held that there had been no such hearing and the decree *nisi* was therefore vacated. From the case reported in 3 N.L.R. (Ceylon) 34 it appears that though a defendant appears at the

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2. (1926) I.L.R. 50 M. 261 · 52 M.L.J. 240 (F.B.)
3. (1916) L.R. 44 I.A. 6: I.L.R. 40 M 112: 32 M.L.J. 35 (P C).

P. L. S. Firm, Colombo v. Sulaiman.

Wallace, J.

ex parte hearing, he cannot plead because he is in default. In both cases, it is clear that the hearing is not a trial on the merits of the matters in controversy. As is stated clearly in the latter case, the defendant's objections to plaintiff's case "could not be tried until pleaded by the defendant who was wilfully in default." The decision therefore remains a decision for default of appearance, and not on the merits, and it is clear, as I have pointed out, from section 87, that defendant may, at any later stage, for good reasons shown, have the decree for default set aside and the case tried on the merits. In other words, the decree *nisi* and the decree absolute under sections 85 and 86 are not decisions on the merits. I would, therefore, decline to interfere and dismiss the appeal with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Appathurai Aiyar and another .. *Petitioners* (Appellants-Petitioners)*

v.

Panayappan Servai .. *Respondent (2nd Respdt.).*

Appathurai Aiyar v. Panayappan Servai.

Limitation Act (IX of 1908), Art 182, clause (5)—Purchase of property in execution by the decree-holder—Application to obtain delivery of possession—If a step-in-aid of execution

An application to obtain delivery of possession of the property by the decree-holder who has himself purchased the property in execution of his decree is a step-in-aid of execution within the meaning of Art 182, clause (5) of the Limitation Act.

Mathonkandi Kannan v. *Thayyil Pakkutti Ammulla Haji,* (1926) 52 M.L.J. 1 followed.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Sivaganga, dated 18th December, 1926 in A.S. No. 90 of 1926 (A.S. No. 323 of 1926 on the file of the Ramnad District Court at Madura) preferred against the order of the Court of the District Munsif of Manamadura, dated 21st October, 1925 and made in E.A. No. 886 of 1925 in S.C. No. 1338 of 1917.

S. R. Muthuswami Aiyar for petitioners.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The petitioner before me is the auction-purchaser of the properties sold in execution of the decree in S.C.S.

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*C.R.P. No. 1165 of 1927. 30th April, 1929.

Appathurai Aiyar v. Panayappan Servai.

No. 1338 of 1917 on the file of the District Munsif's Court of Manamadura. He himself is the decree-holder in that suit. He purchased the property on the 31st January, 1922. Afterwards on the 29th January, 1925 he filed E.A. No. 240 of 1925 for obtaining delivery of possession of the property. The application was dismissed for non-payment of batta. A fresh application E.A. No. 886 of 1925 was filed on the 29th September, 1925, *i.e.*, within eight months after the dismissal of E.A. No. 240 of 1925. It was held by both the Lower Courts that this petition E.A. No. 886 of 1925 cannot be treated as a continuation of E.A. No. 240 of 1925 and is therefore barred by limitation. The present petition is against this order.

It is argued on behalf of the petitioner that there is no need to treat the present petition as a continuation of the prior application as the prior application itself according to the latest decision of this Court is to be considered as a step-in-aid of execution, and since the present application has been filed within eight months after the prior application it must be considered to be within time. In support of his argument reference is made to the decision reported in *Mathonkandi Kannan* v. *Thayyil Pakkutti Avvulla Haji*,[1] which seems to be a case very much similar to the present one. The head-note of the case which represents the point that was decided is as follows:

> "An application for delivery of property by a decree-holder who has purchased the property in execution of his own decree is a step-in-aid of execution within the meaning of the expression in Art. 182, clause (5) of the Limitation Act and that an act or an application in order to be a step-in-aid of execution need not be in a pending execution application."

If that is so, E.A. No. 240 of 1925 is certainly a step-in-aid of execution, and since E.A. No. 886 of 1925 has been filed within eight months after the disposal of the prior application that also must be considered to be in time and is not time-barred. The petition must therefore be restored to file and disposed of on the merits. The case is remanded for disposal on the merits to the District Munsif's Court of Manamadura. This petition is allowed with costs throughout.

N.S. *Petition allowed.*

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1. (1926) 52 M.L.J. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE.

King-Emperor .. *Petitioner* in both (Complainant)*

v.

Abdul Malik .. *1st Accused in both.*

King-Emperor *v.* Abdul Malik.

Penal Code (XLV of 1860), S 75—Old offender—Enhanced punishment on ground of—Condition precedent to—Procedure to be observed in cases where accused is an old offender

An accused person cannot be sentenced to enhanced punishment as an old offender until there is some proof or admission by him before the Court that he is the person who committed the previous offences.

The practice of accepting a mere certificate by the Police as proof that an accused is an old offender and of not entering the particulars of previous convictions in the statement of charge or reading out the same to him condemned.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the Chief Presidency Magistrate, Egmore, Madras, in C.C. Nos. 15013 and 15014 of 1928.

P. Govinda Menon for *The Crown Prosecutor* for the Crown.

The Court made the following

ORDER.—Accused does not appear. I am asked to enhance the sentence of imprisonment passed on accused on the ground that it is much too light for an old offender. I agree that it is much too light if accused is an old offender. The difficulty is that I find no proof of that. I am told that the practice in the Presidency Magistrate's Courts is to accept a mere certificate by the Police as proof that an accused is an old offender and that the particulars of previous convictions are neither entered in the statement of charge nor read out to him. All the information given to accused is that he is charged under S. 75, Indian Penal Code, which of course conveys nothing to him. He is clearly entitled to challenge the fact of the various previous convictions made matter of charge against him, and if he challenges these, then proof of these convictions and of his identity with the person previously convicted must be given. If the present practice is as I am now informed then the sooner it is altered the better. An accused person cannot be sentenced to enhanced punishment as an old offender until there is some proof or admission by him before the Court that he is the person

*Cr. Rev. Cases Nos. 107 and 108 of 1929. 8th April, 1929.
(Cr. R. Ps. Nos. 89 and 90 of 1929.)

King-Emperor v. Abdul Malik.

who committed the previous offences. I am, therefore, unable to enhance the sentence on the ground of accused being an old offender as there is no proof that he is.

Apart from that it appears to me that the Chief Presidency Magistrate was unduly lenient in making the sentences in these two cases run concurrently. There were two distinct house-breakings and it is a mistake to treat such offences leniently. I direct that the sentence in C.C. No. 15013 do come into force on the expiry of the sentence in C.C. No. 15014 of 1928.

A.S.V. *Ordered in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Municipal Council, Cuddappah .. *Appellant** *(Deft.)*

v.

The Madras and Southern Mahratta Railway Co., Ltd. .. *Respondents (Plffs.).*

Municipal Council, Cuddappah v. M. & S. M. Railway Co., Ltd.

Madras District Municipalities Act (V of 1920), Ss. 135 and 81—Railway Company—Property tax on—Levy of—Legality—Notification declaring liability of company to pay "house, land and water taxes" if sufficient to justify—Notification referred to in S 135—Validity of—Terms necessary for—Statute—Taxing statute—Interpretation of—Conditions precedent to levy of tax—Compliance with—Necessity.

The Municipal Council, Cuddappah, assessed the Madras and Southern Mahratta Railway Company to property tax in respect of certain vacant sites belonging to the Railway Company, purporting to do so under the Madras District Municipalities Act (V of 1920), whereby Municipal Councils are entitled to levy property tax under section 81 of the Act. There was no notification issued by the Government of India after Madras Act V of 1920 came into force; and all that the Municipal Council was able to rely upon was a notification of 24th November, 1911, which had been issued under the previous Act and which declared the Railway Administration liable to pay "house, land and water taxes."

Held, that the taxes in respect of which the notification of 1911 was issued were substantially different from the "property tax" mentioned in section 81 of the Act of 1920, and as the rates were different, and the incidence was also different, the notification of 1911 did not justify the levy of the tax in question. Taxing enactments should be strictly construed and the right to tax should be clearly established. Conditions precedent to the imposition of any tax should be strictly complied with.

Per *The Chief Justice—Quaere*: Whether a notification in the terms of that of 24th November, 1911, was not *ultra vires* of the statute; in other

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*O.S. No. 35 of 1927. 12th February, 1929.

Municipal Council, Cuddappah v. M. & S. M. Railway, Co., Ltd.

words, whether the mere notification of categories of taxation sanctioned without specific reference to the section of the District Municipalities Act which purports to impose such a tax is not *ultra vires* of the Government of India.

Appeal against the decree and judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar passed in the exercise of the Extraordinary Original Civil Jurisdiction of the High Court in C.S. No. 123 of 1925.

C. Sambasiva Rao for *T. R. Arunachalam* for appellant.

R. N. Aingar instructed by *Messrs. King and Partridge* for respondents.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *The Chief Justice.*—Under section 135 of the Indian Railways Act (IX of 1890) it is laid down that a Railway Administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Governor-General in Council has, by notification in the Official Gazette, declared the Railway Administration to be liable to pay the tax. This tax is sought to be imposed by virtue of Act V of 1920, the District Municipalities Act, whereby Municipal Councils are entitled to levy property tax under section 81. In fact, no notification has been issued by the Government of India since Madras Act V of 1920 came into force and the Municipal Councils can only rely upon a notification of the 24th November, 1911, which was issued under the previous Act. It is said that the new section of the Act of 1920 amounts to no more than a compressing into one category of what under the old Act had fallen under three. To my mind that argument is unsound. Taxing statutes are to be construed strictly and the argument appears to me to violate all recognised principles of statutory construction. That is enough to dispose of this case. That is the conclusion that the learned Judge came to and we think that his judgment should be confirmed and the appeal dismissed with costs.

But it is obvious that a wider question is in the offing, and, though it is not necessary for the decision of this case, I think I ought to indicate it, in the hope that a consideration of it may avoid future difficulties. In the notification of 1911 the taxes which the Railway Administration was declared liable to pay were defined generally as house, land and water tax in the schedule to that notification. I entertain very great doubts as to whether a notification in such terms is *intra vires* of the statute. What an assessee wishes to know is not so much what is the nature of the tax and to what subject-matter it applies as his

Municipal Council, Cuddappah v. M. & S. M. Railway Co., Ltd.

Coutts Trotter, C. J.

liability to pay under the section of the District Municipalities Act in force at the time, in other words, he is not greatly interested whether he is paying a tax on land or in respect of the supply of water, but he is vitally interested to know how much he is called upon to pay and that depends upon the particular section applicable of the District Municipalities Act. I am strongly inclined to think that the notification required should not be in mere general terms specifying the nature of the tax which leaves the Municipality free to impose a tax of any amount they chose provided it falls into the class specified by the notification. However this case can be decided on the narrower ground I have indicated in the first part of this judgment and it is not necessary to base it on the wider one that the mere notification of categories of taxation sanctioned without specific reference to the section of the District Municipalities Act which purports to impose such a tax is *ultra vires* of the Government of India. But I think it is a point which the Government of India should carefully consider and if necessary rectify it in future notifications.

Ananta-krishna Aiyar, J.

Anantakrishna Aiyar, J.—The Municipal Council, Cuddappah, is the appellant in this appeal. The Municipal Council assessed the Madras and Southern Mahratta Railway Company to property tax in respect of certain vacant sites belonging to the Railway Company. After paying the amount of the tax under protest, the Company filed Original Suit No. 615 of 1924 on the file of the District Munsif's Court, Cuddappah, for a declaration that the assessment was illegal and for refund of the amount of the tax with interest. The suit was transferred, and withdrawn, to the file of the High Court, and the learned Judge who tried the suit on the Original Side of this Court granted the reliefs prayed for by the plaintiff Company.

The ground on which the learned Judge held in favour of the plaintiff is that no proper notification has been issued by the Government of India under the Railways Act, making the Railway Company liable to pay the property tax claimed by the Municipal Council. To appreciate the dispute between the parties, it is necessary to state that under section 135 of the Indian Railways Act (IX of 1890)

"Notwithstanding anything to the contrary in any enactment or in any agreement or award based on any enactment the following rules shall regulate the levy of taxes in respect of railways and from Railway Administration in aid of the funds of the local authorities, namely

(1) A Railway Administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Governor-General in

Municipal Council, Cuddappah v. M. & S. M. Railway Co., Ltd.

Ananta-krishna Aiyar, J.

Council has, by notification in the Official Gazette, declared the Railway Administration to be liable to pay the tax"

It is common ground that on 29th of November, 1907 a notification was issued by the Government of India under section 135 of the Indian Railways Act. But on the 24th of November, 1911, Notification No. 230 was issued by the Government of India, Railway Department, in these terms:

"In pursuance of section 135 of the Indian Railways Act, 1890 (IX of 1890) and in supersession of all previous notifications on the subject, the Governor-General in Council is pleased to declare that the administration of the Madras and Southern Mahratta Railway Company shall be liable to pay in aid of the funds of the local authorities set out in the schedules hereto annexed, the taxes specified against each in the 2nd column thereof.

SCHEDULE.

Local authorities.		Taxes.
Cuddappah	..	House, Land and Water taxes.

(Sd.) VOLKERS,
Secretary, Railway Board."

On the date of the above notification, Madras District Municipalities Act (IV of 1884) was in force in this Presidency. Under that Act the Municipal Council had authority to levy tax on buildings or lands or both (under section 63), and also levy water tax under section 75. Act IV of 1884 has since been repealed by Madras Act V of 1920. Under Act V of 1920 Municipal Councils have got authority to levy property tax under section 81. That section enacts that property tax which shall be levied at a consolidated rate on all buildings and lands shall comprise a tax for general purposes and may also comprise (*a*) Water and drainage tax, (*b*) Lighting tax, and (*c*) A Railway tax.

No notification has been issued by the Government of India after Madras Act V of 1920 came into force. The question for consideration is whether the Municipal Council, Cuddappah, is entitled to levy "property tax" in respect of vacant sites of the Railway Company by virtue of the notification issued by the Government of India in 1911 quoted above. The learned Trial Judge has answered the question in the negative, and in my opinion he is right.

It was argued by the learned counsel who appeared for the Municipal Council that the notification of 1911 should be taken to authorize the Municipal Council to levy what is mentioned as pro-

perty tax in section 81 of the District Municipalities Act V of 1920 in respect of lands. He argued that the property tax mentioned in section 81 was to be levied on all buildings and lands within the Municipal limits and that the same shall comprise a tax for general purposes and may also comprise a water and drainage tax, and that as under the notification the levy of house, land and water taxes was authorised, property tax also should be taken to have been authorised in so far as tax on lands is concerned. I am unable to agree with that contention. S. 135 of the Indian Railways Act makes it clear that a Railway Administration was not to be liable to pay any tax in aid of the funds of any local authority unless the Governor-General in Council has, by notification in the Official Gazette, declared the Railway Administration to be liable to pay the tax. When therefore a Municipal Council seeks to make a Railway Administration liable for any tax, it should be able to produce a notification by the Government of India declaring the Railway Administration to be liable to pay that tax. What is now sought to be levied is "property tax." The Municipal Council should produce a notification by the Government of India declaring the Railway Administration to be liable to pay the "property tax." It is not enough if the Council is able to produce a notification declaring the Railway Administration liable to pay "house, land and water taxes." The two are substantially different. Under section 63 of the Municipal Act of 1884 there was a limit to the rate at which taxes on buildings and lands could be levied, namely, 8½ per cent. on the annual value of the buildings or lands or both. Under Act V of 1920 there is no such limit, and what is called the "property tax" in section 81 comprises many things which could not be held to come under "house, land and water tax." Taxing enactments should be strictly construed and the right to tax should be clearly established. Conditions precedent to the imposition of any tax should be strictly complied with. In the absence of any notification by the Government of India declaring the Railway Administration to be liable to pay "property tax," I think the learned Judge was right in his view that the Municipal Council had no right to levy tax in respect of vacant sites owned by the Railway Company in question. The policy of the legislature would seem to be to reserve to the Governor-General in Council the right to decide what taxes the Railway Administrations are to be made liable for and to what extent. The Governor-General in Council had no occasion to consider whether the Railway Administration in question should pay "the property tax" men-

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

The Secretary of State for India in Council through the Collector of East Godavari .. *Petitioner** (*Deft.*)

v.

Sannidhiraju Subbarayudu and others .. *Respondents* (*Plffs. and L.Rs. of Plff.*).

Secretary of State for India in Council *v.* Subbarayudu.

Civil Procedure Code (V of 1908), S 110—Suit involving a recurring claim by Government to levy water cess annually—Value less than Rs 10,000—Likelihood of similar questions arising in other estates or districts or in connection with other rivers—Suit, if can be said to involve indirectly a claim of the value of Rs 10,000—Section 109 (c)—Point finally settled by decisions of the Privy Council—Whether a fit one for appeal to Privy Council.

A suit which involves a recurring claim, of the value of less than Rs 10,000, by the Government to levy water cess annually cannot be said to involve a claim of the value of Rs. 10,000 indirectly, simply because similar questions may arise in other estates or other districts or in connection with other rivers.

Where a matter is finally settled by decisions of the Privy Council, it is not one of general or public importance to justify the grant of a certificate that it is a fit one for appeal to the Privy Council under section 109 (*c*) of the Civil Procedure Code

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioner to appeal to His Majesty in Council against the decree of the High Court in S.A. No. 1216 of 1924 preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in A.S. No. 104 of 1923 (O.S. No. 833 of 1918, District Munsif's Court, Amalapur).

The Government Pleader for petitioner.

N. Rama Rao and *P. Panini Rao* for respondents.

The Court made the following

ORDER.—The suit out of which the appeal arose was to recover Rs. 8-13-2. The claim for this amount is no doubt a recurring claim as the Government claim to levy water-cess annually. Capitalising at twenty times the amount, the value of the suit is less than Rs. 180. The suit does not involve property or claim of the value of Rs. 10,000 directly. It is then argued that it involves a like claim indirectly, simply because similar questions may arise in this Presidency in other estates or other districts or in connection with other rivers. We do

*C.M.P. No 4662 of 1927. 24th April, 1929

Secretary of State for India in Council v. Subbarayudu.

not think that this is the proper interpretation of the word "indirectly." If the decision of an issue in this case makes the decision of the same issue in other cases *res judicata* or some such similar connection can be shown, the value of other disputed matters may be taken into consideration. This is the view taken by one of us and Venkatasubba Rao, J., in C.M.P. No. 793 of 1929 (see *Radhakrishna Aiyar* v. *Sundaraswamier.*[1]) It is suggested that 240 acres of the suit zemindari may be possibly irrigated hereafter. This is a bare assertion by the suits' clerk in the Collector's Office and we do not know his means of knowledge. His affidavit does not disclose how he knew anything of the region with which the suit is connected. The counter-affidavit states that only 170 acres are liable to irrigation hereafter. This is getting into a region of conjectures and bare possibilities and we do not think it is justified by the use of the word "indirectly."

It is next contended that it is a matter of general importance. After the decisions of the Privy Council in *Prasad Row* v. *The Secretary of State for India*[2] and *Secretary of State for India in Council* v. *Maharajah of Bobbili,*[3] we think that the matter is finally settled and that there is no question to be agitated as one of public importance.

The petition is dismissed with costs.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

A. Ramalinga Udayar .. *Petitioner** (*1st Accused*)

v.

Ramasami Mudaliar ... *Respondent* (*Complainant*).

Ramalinga Udayar v. Ramasami Mudaliar.

Criminal Procedure Code (V of 1898), Ss 231 and 257—Alteration of charge—Right of accused to examine new witnesses—When exercisable

Where a charge is altered, the accused is entitled to have his new witnesses examined, unless the Magistrate thinks that the application for the examination of such witnesses is made for the purpose of vexation or delay or for defeating the ends of justice in which case it is essential that he must record the grounds.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the

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*Cr. Rev Case No. 320 of 1929. 28th May, 1929
(Cr R P No. 287 of 1929)

1 (1922) L.R. 49 I.A. 211: I.L.R. 45 M. 475 at 480. 43 M.L.J. 323 (P C)
2 (1917) L.R. 44 I A. 166: I.L R. 40 M. 886: 33 M.L.J. 144 (P.C)
3 (1919) L.R. 46 I.A. 302: I.L.R. 43 M. 529. 37 M.L.J. 724 (P.C.)

order of the Court of the Additional District Magistrate of Tanjore, dated 21st March, 1929 and passed in C.C. No. 10 of 1927.

K. S. Jayarama Aiyar for *V. L. Ethiraj* and *M. Ranganatha Sastri* for petitioner.

A. Srirangachari for *V. Rathnam* for respondent.

K. Venkataraghavachariar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—This case has already been before the High Court twice. As the learned Additional District Magistrate remarks, the complaint was filed in 1927. Devadoss, J., at one stage of the case suggested that the charge may as well be amended. In pursuance of that suggestion, the charge was as a matter of fact amended. The question then arose whether the accused was entitled to have the witnesses who were already examined in the case re-examined. The learned Additional District Magistrate held that he was not entitled to have the witnesses already examined re-examined simply because the charge was technically amended. He was corrected by this Court and Reilly, J., in his order, dated 20th September, 1928, directed examination of the witnesses who were already examined in the case. After that a further difficulty has arisen. The accused seems to have filed two lists of witnesses, the first on the 8th August, 1927 and the second on the 14th September, 1927. The second list contained the names of 28 witnesses. After the charge was altered on the 26th May, 1928, the accused wanted to add to the number of witnesses to be examined and gave a third list of witnesses. This third list contained the names of 42 witnesses. The question was raised before the Additional District Magistrate whether the accused was entitled to have new witnesses examined whose names he had not included in either the first or the second list. As I understand the learned Additional District Magistrate's order, he has allowed the examination not only of the prosecution witnesses who had been already examined but also of such of the defence witnesses who had been examined and whose examination was asked for on behalf of the accused. The dispute between the parties (as I understand) has centred on this, whether some of the witnesses included for the first time in the third list should, as a matter of right, be examined on the side of the accused. It was contended on behalf of the prosecution that the learned Additional District Magistrate has,

Ramalinga Udayar v. Ramasami Mudaliar.

as a matter of fact, directed his attention to the question whether these additional witnesses are material to the defence as disclosed by the altered charge and it was pressed before me that, in his order he was of the opinion that the application to have these witnesses examined was made only for the purpose of vexation and delay. On the other hand, on the side of the accused, certain other portions of the order were read to me where the Magistrate emphasized one aspect of the question, namely, that a new line of defence was chalked out after the charge was altered, and that it is with a view to support this new line of defence that these additional witnesses were sought to be examined, taking advantage of the fact that the charge was altered. But the point that I have to decide, according to me, is this: when a charge has been altered, having regard to the provisions of sections 231 and 257 of the Criminal Procedure Code, what is the proper order that a Magistrate should pass with reference to new witnesses that an accused person seeks to examine. I am unable to agree with the suggestion made on behalf of the complainant that under section 231 the obligation that the Magistrate is under is only to examine such of the witnesses as have already been examined and that with reference to the other witnesses the Magistrate is entitled to decline to issue process to examine them, unless, in the words of the section, the Court thought their evidence to be material. This extreme step would lead to this result, that even with reference to the witnesses who have already been cited and whose names were included in the prior lists, and to whom process might have been issued in the first instance, the Magistrate would further be entitled to ask himself the question whether the Court thought their evidence to be material. After reading sections 231 and 257 I have come to the conclusion that after the charge is altered the accused is entitled to have his witnesses examined, unless for reasons mentioned in section 257 the Magistrate thinks that the application is made for the purpose of vexation or delay or for defeating the ends of justice. The two sections 231 and 257 have to be read together, and that is the construction which, I think, should be placed, having regard to the principle underlying sections 231 and 257. No doubt this case has been pending for a long time, but unless the preliminary steps are all properly gone through, it may be that the Appellate Court may at a still later stage find itself in a difficult position; and therefore I have come to the conclusion that the Magistrate should be directed to consider whether, with reference to the new witnesses included in the

third list, any grounds are shown such as are mentioned in sections 231 and 257, and if he comes to the conclusion that any particular new witness included in such list should not be examined, he will state the grounds as mentioned in section 257. No doubt section 231 does not state that the grounds should be mentioned; but having regard to the fact that the Appellate Court might have to consider whether the evidence of such new witnesses would have been material or not, it is always essential that the grounds should be so recorded. I was shown some confidential memorandum filed before the Additional District Magistrate, but I think on the whole it is better not to rely on confidential memoranda in a case like this, but to follow the principle underlying sections 231 and 257 and to proceed to record with reference to each particular new witness whether there are grounds as mentioned by the sections. I send the case back to him with these remarks, so that he may deal with the case in the light of the observations made above. Of course the witnesses whose evidence was dispensed with after the alteration of the charge need not be examined.

N.S. *Petition allowed and case sent back to the Magistrate.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

V. E. Rajabhadur Mudaliar .. *Petitioner**

v.

A. M. Visvanatha Reddiar and A. R. Muthuswami Aiyar .. *Respondents.*

Madras Local Boards Act (XIV of 1920), S. 45—Dissolution of Union Board and order of reconstitution by Local Government—Appointment of Special Officer to exercise the powers and duties of Union Board and its President till reconstitution under clause (3)—Election and nomination of members of the Union Board—Power of Special Officer to convene, and postpone, meeting of the elected and nominated members to elect a President—Power of Special Officer to preside at such meeting till a President is elected—Election—Use of mark by blue pencil by some of the voters—Secrecy of ballot, if and when violated—Rules for the election of President and Vice-President framed under the Act—Rule 4 (2)—Method of drawing lots in case of tie—Violation of the method enacted by the Rule—Violation bona fide *and acquiesced in by all the candidates—Election, if invalid—Rules governing election enquiries framed under the Act, Rule 11 (c).*

An Union Board cannot be said to be fully reconstituted by the election and the nomination of the members until the President is elected and, consequently, a person appointed by the Local Government under S. 45 (3)

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*C.R.P. No. 169 of 1928. 22nd April, 1929.

of the Local Boards Act to exercise all the powers and duties of the Union Board and its President till its reconstitution has power to fix a date for the meeting of the newly elected and nominated members to elect a President; to postpone the meeting to a later and more convenient date by previous notice to these members, and to preside over the postponed meeting till the President is elected

Smith v *Paringa Mines, Ltd*, (1906) 2 Ch 193 and *Dwarka Charyulu* v. *Sri Krishnan,* A.I R. 1925 Mad. 1152 distinguished

The fact that, at an election, some of the voters used blue pencils to mark their votes does not violate the secrecy of the ballot so as to invalidate the election, if the use of such marks did not really indicate the persons who used them.

Xavier v. *Joseph,* (1924) 48 M.L.J. 268 and *Viswanatha Pillai* v. *Periasami Pillai,* (1924) 46 M.L.J. 491 referred to.

Where there was a violation of Rule 4 (2) of the Rules for Election of President and Vice-Presidents framed under the Local Boards Act in the method of the drawing of the lots but the violation was a perfectly *bona fide* one on the part of the Officer holding the election and all the candidates inclusive of the defeated candidate thought it the proper method of drawing the lots at that time and acquiesced in it, the case falls under Rule 11 (*c*) of the Rules governing election enquiries framed under the Act and the election should not be set aside, as the variation in the method of the drawing of the lots cannot be said to have affected either candidate's chance of success at the expense of the other.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge of Chittoor in O.P. No. 15 of 1927.

K. Bhashyam Aiyangar and *V. C. Veeraraghavan* for petitioner.

T. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT.—The petitioner seeks to set aside the order of the Subordinate Judge of Chittoor, dated 31st October, 1927, by which he dismissed the petitioner's objection petition to the election of 1st respondent as the President of the Union Board of Arkonam. By G.O. No. 4290, L. & M., dated 5th October, 1926, the Local Government had in pursuance of S. 45 (1) of the Madras Local Boards Act dissolved the said Union Board and ordered it to be reconstituted and under cl. (3) of the same section appointed Mr. Muthuswami Aiyar, Sub-Magistrate of Arkonam (2nd respondent), as Special Officer to exercise all the powers and duties of the Union Board and its President till it was properly reconstituted. The Special Officer was instructed to make arrangements for the election of the nine elected members, and the President, Taluk Board, Ranipet, was requested to nominate the three nominated members, and when that was done the Special Officer was to arrange for the election of the President

so that the reconstituted Union Board might be brought into existence as early as possible. The Special Officer had got the nine elected members elected and the three nominated members nominated. Then he called a meeting of the members to elect a President for 20th April, 1927. This date was by subsequent notice changed to 25th April, 1927, as the Special Officer could not be present on the 20th owing to Easter. At the meeting held on 25th April under the presidency of the Special Officer, there was a tie, the petitioner and the 1st respondent each securing five votes at the ballot. Thereupon the Special Officer proceeded to decide the question by casting lots, which he did by using two sets of two slips each. One set contained the names of the candidates. Of the other set, one paper bore a cross-mark to indicate the prize or president, the other slip was blank. Both sets of slips were independently shaken and put aside and one slip from each set was drawn by the hand of a little boy aged under 10. At first the petitioner's name was drawn along with the blank slip. Then the 1st respondent's name was drawn along with the prize-president's slip. The 1st respondent was declared elected.

The petitioner in his petition to the Lower Court objected to 1st respondent's election on various grounds of which four were pressed in the Lower Court:

(1) The Special Officer had no authority to preside over the meeting of 25th April as he had become *functus officio* by the election and nomination of the full complement of members. (2) He had no power to adjourn the meeting from 20th to 25th April and so the meeting on the latter date was not validly held. (3) The secrecy of the ballot which resulted in a tie was violated by the use by two of 1st respondent's supporters of a blue pencil to mark their votes. (4) The drawing of lots was not done in the usual manner or according to the rules and the petitioner's name having been first drawn he should have been declared elected. The Lower Court rejected all these grounds of objection. The petitioner's learned Advocate has pressed the same objections in this Court.

The contention that the Special Officer had no power to preside over the meeting at which the election of the new President was to take place is based on the theory, unfounded in my opinion, that the new Board had been fully reconstituted by the election of the elected members and the nomination of the nominated members and that thereupon the duties of the Special Officer were at an end. By section 12 (3) every Union Board

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shall elect one of its members to be a President to whom by various provisions of the Act most important functions of an administrative and executive character are assigned. In fact a Board without a President is unthinkable and unworkable under the Act, and it follows that till the President was elected, the Board was not fully constituted. The twelve persons who had been elected or nominated had not taken the oath or entered on their office and could not be left to shift for themselves at that stage. None of them had any authority to summon a meeting of his future colleagues or to administer the oath or to conduct an election for the President. It is in fact to prevent such an *impasse* that section 45 empowers the Local Government to invest the Special Officer with all such powers of the Board and its President as it may determine between the dissolution and the reconstitution of a Local Board and in the G O., dated 5th October, 1926, the Special Officer was expressly instructed to arrange for the election of the President. This was exactly what 2nd respondent did and he did no more. This contention fails.

I do not see how, if it was competent to the Special Officer to convene the meeting for the 20th April, he was incompetent when he found it impossible to attend on that date to postpone the meeting by previous notice to a more convenient date. There was no adjournment in the proper sense, as the meeting of the 20th was not held but only a fresh date fixed for the meeting. There was nothing which required the meeting to be held on any particular date. The petitioner's Advocate referred to *Smith* v. *Paringa Mines, Ltd.*[1] and *Dwarka Charyulu* v. *Sri Krishnan.*[2] The former case relates to the directors of a limited company, the articles of which did not give the directors power to postpone general meetings of shareholders once called. In the latter case which arose under the transitory provisions in Sch. X of the Local Boards Act, at a meeting of the Union Board members called to elect their President by the President of the Taluk Board, some members of the Union Board attended; but there was no quorum. The Taluk Board President, instead of calling a fresh meeting, purported to adjourn the meeting to a future date. It was enough for the decision of the case and all that was decided was that the President of the Taluk Board could not, according to the meaning of the particular rule under which he acted, dispense with the formalities of a fresh meeting and that an election of the Union Board President held at the

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1 (1906) 2 Ch. 193. 2 A.I.R. 1925 Mad. 1152.

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so-called adjourned meeting was invalid. This has no bearing on this case. This contention also fails.

The next objection is that the secrecy of the ballot was violated because two of 1st respondent's supporters used by previous arrangement with 1st respondent blue pencils to mark their votes so as to assure him that they had voted for him. The law on the point is settled and will be found discussed in Rogers on Elections, p. 112 (see also *Woodward* v. *Sarsons*,[3] *Xavier* v. *Joseph*[4] and *Viswanatha Pillai* v. *Periasami Pillai*[5]). The question was really one of fact whether the use of blue pencils by two of the voters in this case did really indicate the persons who used them. The petitioner examined witnesses to prove the alleged arrangement. The learned Judge disbelieved the evidence and found that the marks being in blue pencil did not help to identify the voters and that one of those who used blue pencils could not be identified even after the enquiry. This objection also fails.

The last objection is that the method adopted by the Special Officer for drawing lots was not proper. According to Rule 4 (2) of the Rules for Election of President and Vice-Presidents, where there is a tie, the election is to be determined by drawing lots and the person whose name is first drawn is to be declared elected According to Webster's Dictionary in drawing lots each competitor may place his lot (marked) in a receptacle from which a disinterested person draws one on the owner of which the chance falls or each competitor may draw one of a series of lots, the chance falling upon the person who draws one previously specified. In casting lots, the lots are placed by the competitors in a receptacle which is then shaken until one falls out, the chance falling on its owner. The rule refers to a method of *drawing* lots, in which the name first drawn is the successful one and this implies that only one set of lots is to be used. The reason why the Special Officer adopted the method of double set of tokens which according to Webster is another method of drawing lots is that he was provided with a copy of the old rules which had been superseded and which simply required that lots should be cast in the presence of the members. To this extent, therefore, there was a variation from the strict letter of the prescribed mode of drawing lots. The question is whether this variation vitiated the election. The Special Officer who was examined in the case explained that, after the ballot

3. (1875) L.R. 10 C.P. 733. 4. (1924) 48 M.L.J. 268
5. (1924) 46 M.L.J. 491.

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resulted in a tie, he explained to all present that he proposed to cast lots and how he proposed to do it. No one objected and there can be no question that the use of the double sets of slips instead of a single set was perfectly *bona fide* on the part of all present and that the petitioner and every one else concerned acquiesced in it. The petitioner's present objections are, no doubt, due to the fact that he was defeated and it is not too much to presume that, if he had won, he would not object to the method. The petitioner's contention that his name having been first drawn, though with a blank slip, he should have been declared elected is, of course, entitled to no weight as he cannot both adopt and disown the same method. If he adopts it as he and every one else did at the time, the successful candidate is not the one that drew a blank though it should be the first drawn, but the one that drew the crossed slip. Obviously under the method adopted, the petitioner was not the successful candidate and he cannot claim to be successful, except by distorting the method into one which it was not meant to be either by him or by any one else. The only question is whether the use of a double system of slips in which the successful candidate is not necessarily the first name drawn was such a violation of R. 4 (2) so as to invalidate the election. In view of the fact that the violation, if any, was a perfectly *bona fide* one on the part of the Special Officer and that the petitioner and every one else present thought it the proper course and acquiesced in it and that the use of double slips or lots is after all merely a method of drawing lots which is the essence of the matter, I am of the opinion that the matter is covered by Rule 11 (c) of the rules governing election enquiries which enacts that no election should be set aside by any non-compliance with the provisions of the Act or Rules unless the result of the election had been materially affected by the same. In this case there is no foundation for saying that the method of double slips affected the chance of the petitioner's success any more than his rivals. The election itself having to be determined by chance (drawing of lots) and the method adopted not having affected either candidate's chance of success at the expense of the other, it cannot be said that that method affected the election materially or at all. On this ground, this objection also fails. This petition is dismissed with costs.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN PANDALAI.

Vasireddi Sri Chandramouleswara Prasad Bahadur Manne Sultan Zamindar Garu of Muktayala .. *Appellant** (*Plff.*)

v.

Javvaji Papayya .. *Respondent* (*Deft.*).

Vasireddi Sri Chandramouleswara Prasad Bahadur *v.* Javvaji Papayya.

Madras Estates Land Act, Ss 210 and 211 (2)—Provisions of Limitation Act—Applicability

The provisions of the Limitation Act made applicable by S. 211 (2) of the Madras Estates Land Act are subject to the operation of S. 210, and the periods limited by the schedule, of the same Act.

Second Appeal against the decree of the District Court of Kistna at Masulipatam in A.S. No. 166 of 1926 preferred against the decree of the Court of the Sub-Collector of Bezwada Division in S.S. No. 85 of 1925.

P. Satyanarayana Rao for appellant.

V. Ramadoss for respondent.

The Court delivered the following

JUDGMENT.—This appeal arises from a suit brought by a land-holder under section 151 of the Madras Estates Land Act. The defendant is a ryot who is in possession under a patta of ten cents of dry land adjacent to his house. The plaint allegations were that on the 26th August, 1923, the defendant began to remove earth by digging pits in these ten cents of land, that by doing so the value of the holding was materially impaired and the land substantially rendered unfit for agricultural purposes. The plaintiff claimed that on those allegations he was entitled under section 151 of the Act to eject the defendant from his holding, or in the alternative to compensation or an injunction. The plaintiff sued for all the three reliefs assessing his damages at Rs. 500. The defendant pleaded that he did not dig pits on the 26th August, 1923, as alleged by the plaintiff, or render the holding unfit for cultivation for agricultural purposes by doing so. But he alleged that these ten cents of land had never been cultivated for 20 years, having been always unfit for cultivation, that it was in fact a manure pit used for storing manure, which itself was a very useful purpose in connection with agriculture. As to damages, the defendant said that it would cost not more than Rs. 20 (twenty) to fill

*S.A. No. 155 of 1928. 21st February, 1929.

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up the pit. There were some other allegations relating to the tenure of the land which are now not material. The Sub-Collector who heard the case framed as many as eight issues of which only one and two are material. The first was whether the defendant has dug pits in item 2 of plaint scheduled lands and rendered the said holding unfit for agricultural purposes and the second whether the plaintiff's suit is barred by time. The Sub-Collector took evidence on all the issues but decided only the above two. Not only on the evidence recorded before him but after a personal inspection of the property, he found that the plot in question was a narrow strip of land about 10 yards wide behind the house of the plaintiff. He also found manure stored to a depth of about 1 foot over one-fourth of the area of the land. The so-called pit was itself about a foot deep in the middle of which there were three babul trees which we found were three or four years old. On these facts the Sub-Collector found that the plaintiff's allegation that the defendant had dug the pit on the 26th August, 1923 and thereby rendered the plot unfit for cultivation was untrue, that the land must have remained in the condition in which he saw it for several years prior to the date mentioned and that therefore the suit was barred by limitation under Arts. 17 and 18 in the Sch. A to the Estates Land Act. This opinion was upheld on appeal by the District Judge.

It is argued in second appeal that the Courts should have gone into the other issues and recorded findings on them, that the suit was not barred under the provisions mentioned, because the land was rendered unfit, not when the pits were dug as mentioned in the plaint, but on the subsequent date and lastly, that the suit was governed, so far, at any rate, as the prayer for injunction was concerned, not by Arts. 17 and 18 of Sch. A to the Estates Land Act, but by the provisions of the general Limitation Act. As to the first contention, in the nature of the findings arrived at by the Sub-Collector, it was unnecessary to go into the other issues. The suit had been brought upon definite allegations under a specific provision of the statute and the question of limitation was raised upon those pleadings. When it was found that the suit as brought was barred by limitation, it would have been an unnecessary waste of time to consider other matters. The second point was the most pressed; but in my opinion, it has no foundation whatever. It was argued that the cause of action arose on some date other than the alleged date of the digging of the pits. What other

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date was meant was not stated, except that it was left to be inferred that the date the damage was done was some other date than the date of digging the pits. There is absolutely no foundation in the pleadings for any such inference. The only damage that was alleged was that pits were dug. No other damage was intended or suggested. The issues made this perfectly clear and certainly it is not open to the appellant now to allege that he intended some other damage, which began at some other time not mentioned in the pleadings and not mentioned even in the arguments in appeal. I am of opinion that the only point that had to be actually decided was whether the land was rendered unfit for cultivation by the defendant having dug pits therein, on the 26th August, 1923 or at some period before that date, which was less than two years prior to the date of the suit. This having been found against the plaintiff, the suit was rightly held to be barred.

The last contention is that the suit should have been held to be governed by the general Limitation Act. Mr. Satyanarayana for the appellant said that this result was to be obtained by reading sections 210 and 211 of the Estates Land Act together. It is not possible for me to see how this result could be obtained. Section 211 (2) expressly says: "Subject to the provisions of this chapter, the provisions of the Indian Limitation Act shall apply." But section 210 is within that chapter and that section expressly says that every suit instituted, appeal presented and application made after the period of limitation mentioned in the schedule shall be dismissed, although limitation has not been set up as a defence. From that it follows that the provisions of the Limitation Act made applicable by S. 211 (2) are subject to the operation of section 210 and the periods limited by the schedule. I reject this contention also.

The second appeal fails and is dismissed with costs.

N.S. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Kasinatha Pillai .. *Petitioner* (Complainant in C.C. No. 279 of 1927 on the file of the 2nd Class Magistrate of Tuticorin)*

v.

Shanmugam Pillai and another .. *Respondents (Accused in do.).*

Kasinatha Pillai v. Shanmugam Pillai.

Criminal Procedure Code (V of 1898), S. 253 (2)—"Groundless"—Meaning of—Discharge of accused by the Magistrate—Magistrate, if bound to examine all witnesses offered for examination before ordering discharge

A Magistrate is not bound to examine all witnesses that may be offered or available before discharging the accused under section 253 (2) of the Criminal Procedure Code on the ground that the charge is groundless

Narasamma v Venkatarayudu, (1911) 1 M.W.N. 149 and *Kunj Behari Lal v. Emperor,* (1926) 27 Cr.L.J. 541 relied on

Per Waller, J.—The word "groundless" in section 253 (2) of the Criminal Procedure Code does not mean that the evidence discloses no offence whatsoever but may mean that the evidence must be such that no conviction could be rested on it.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Tinnevelly, dated 6th March, 1928, in L. Dis. No 1552 of 1928-C (C.C. No. 279 of 1927 on the file of the Second Class Magistrate of Tuticorin).

K. S. Jayarama Aiyar for petitioner.

V. L. Ethiraj and *C. Rajamanickam* for respondents.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court delivered the following

Waller J.

ORDER. *Waller, J.*—No doubt, the language used in the three parts of section 253, Criminal Procedure Code, is different, but it is, I think, impossible to lay down any general principle or to attempt to define what precisely is meant by the word "groundless." Probably, as good a definition as any, is that the evidence must be such that no conviction could be rested on it. It obviously does not mean that the evidence discloses no offence whatever.

In this particular case, I see no reason to dissent from the view taken by the Courts below. It is most unlikely that any Court would have convicted after hearing the evidence of the only witness examined. The petition is dismissed.

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*Cr Rev. Case No. 562 of 1928. (Cr R.P. No. 466 of 1928) 30th April, 1929

Kasinatha Pillai v. Shanmugam Pillai.

Krishnan Pandalai, J.

Krishnan Pandalai, J.—This is a petition to revise the order of discharge passed by the Second Class Magistrate of Tuticorin under section 253 (2) of the Criminal Procedure Code. The complaint was brought by the father-in-law of one Sankaragomati Chettiar who had recently died against the cousins of the deceased and alleged that the daughter of the complainant (widow of the deceased) entrusted her own and her children's jewels worth about Rs. 4,000 and her husband's account books to the accused soon after the 15th day ceremony, for the purpose of selling the jewels and realising the outstandings and investing the proceeds for the benefit of the widow and her children and that when the accused were later questioned they denied the receipt of the jewels and accounts. The complainant stated that he presented the complaint as per his daughter's instructions and charged that the accused committed an offence under section 403 of the Indian Penal Code. The Magistrate having summoned the accused, the complainant was examined and cross-examined at length on 21st December, 1927 and 11th January, 1928. The complainant had been previously informed that his daughter, a resident of Tuticorin and the real complainant should be brought to Court to be examined on the 11th January. On that day she was absent. The complainant asked for a commission to examine her which was refused, the Magistrate remarking that the application was not *bona fide*. Then the complainant asked for an adjournment which was also refused. The defence, as appeared from the cross-examination of the complainant, was that the deceased Sankaragomati Chettiar had left a will under which first accused was executor and that he was in possession of the estate as such and not under any entrustment by the widow and that the complainant, an impecunious person, was using his daughter or her name as a tool to coerce the accused to part with the estate.

The Magistrate came to the conclusion that the story told by the complainant was highly improbable, that at the best, the dispute appeared to be one of a civil nature to settle which the complaint was brought as a criminal case, that examination of further witnesses will not in these circumstances be of any use and therefore he discharged the accused. The District Magistrate to whom the complainant preferred a revision petition upheld the Sub-Magistrate's order and dismissed the petition being of opinion that it was frivolous. The learned Advocate for the petitioner has urged before us that the Sub-Magistrate had no power to discharge under section 253 (2) before examining all the complainant's witnesses and that he could not con-

[Kasinatha Pillai v. Shanmugam Pillai. — Krishnan Pandalai, J.]

sider the charge to be groundless before he had heard all the evidence. I wish to lay down no general rule as to whether a Magistrate should in practice examine all witnesses available or how many of them, before acting under section 253 (2). That depends entirely on the circumstances of each case for which no general rule can be laid down. But on the question of legal competence, there is no warrant for saying that Magistrates are bound to examine all witnesses that may be offered or available before taking action under that sub-section. The words of sub-sections (1) and (2) of section 253 are as plain as any words can be on that point. The first sub-section states that if on taking all the evidence referred to in section 252 and if necessary examining the accused, no case is made out against the accused, the Magistrate shall discharge him. The second sub-section says that nothing in that section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, that is, before all the evidence referred to in section 252 has been taken, if for reasons to be recorded the Magistrate considers the charge to be groundless. Authority for supporting such a plain statutory provision would be needless. But authority there is: see *Narasamma* v. *Venkatarayudu*[1] and *Kunj Behari Lal* v. *Emperor*.[2] The amount of evidence which would enable a Magistrate to say that a particular charge was groundless is so entirely dependent on circumstances that no general rule or direction except that he is required to arrive at his conclusion judicially and not capriciously is likely to be of any use. If, acting judicially, a Magistrate has come to the conclusion on grounds to be recorded, that the charge must fail either because the allegations are false or because they disclose a dispute of a civil nature which is distorted into a criminal case or for any other reason, then there is nothing to prevent him from discharging the accused before all the complainant's witnesses have been examined. It follows that the action taken by the Sub-Magistrate was fully within his competence. In revision we are not accustomed to enquire into the merits to see whether the conclusions of the Lower Court are correct on the facts. But I see nothing in the facts which would enable me to say that the order of the Magistrate was not a proper and judicial order. The petition is dismissed.

N.S. *Petition dismissed.*

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1. (1911) 1 M.W.N. 149. 2. (1926) 27 Cr.L.J. 541.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—THE LORD CHANCELLOR, LORD CARSON AND SIR CHARLES SARGANT.

Rakhal Chandra Basak .. *Appellant**

v.

The Secretary of State for India in Council .. *Respondent.*

P. C.

Rakhal Chandra Basak v. The Secretary of State for India in Council.

Lease—Construction—College or school—Lease of house for carrying on—Termination by lessor of, on ground of lessee ceasing to carry on college or school there—Power of—Cessation of use of house for purposes of college or school within meaning of lease—What amounts to—Land Acquisition Act, S 23—House—Lessor of, under lease terminable only at option of lessee—Compensation to, on acquisition of house—Assessment of—Basis of

A lease made in the year 1887 between the predecessor-in-title of the appellants and one *K* commenced with the recital that *K* had taken a lease of the house described therein, and that it was necessary for him to secure a house for a long period, with the object of removing the insufficiency of accommodation and confirming the stability of a school and college which had been established thereon. The lease then recited that the lessors were agreeable, according to the lessee's proposals, to keep the house on lease to the lessee as long as he liked. It went on to stipulate for a monthly rental of Rs. 140 and that the lessee should not be entitled to give up the house before he prepared a house of his own for the school, and that the lessors should not be entitled to take hold of the house unless the lessee gave up the same of his own accord. After the execution of that lease, the lessee carried on a school and college for some twenty years and in the year 1907 he executed an indenture of trust, by which he conveyed the lease and certain other properties to trustees, in order that they might carry on the college and school. In 1908 the school was removed to another site. The college continued to be carried on for the time being on the site leased. At some date between 1908 and 1910 the land adjoining the property demised was acquired by the trustees, and upon the land so acquired a new building was erected for the use of the college The land, the subject-matter of the lease of 1887, was thereafter used partly as a hostel for students at the college, partly for superintendents' building, for a dining room, for lavatory accommodation and for a house for the lodge keeper. That state of affairs continued from 1910 to 1920, the trustees continuing to pay the monthly rent to the lessors. In 1920, by Act XVI of that year, the Indian Legislative Council enacted that the property comprised in the lease should be transferred to and vested in and held by the Governor of Bengal in Council. Some time in that year after the passing of the said Act but before it had actually came into force, the Government determined to acquire the freehold interest in the land.

On a question arising as to the nature of the appellants' interest in the land and the amount of compensation to be paid to them,

Held that, on the true construction of the lease, the lease was determinable only at the option of the lessee and that the lessors were not entitled to determine it upon the lessee ceasing to carry on a college or school there.

*P.C. Appeal No. 161 of 1927. 5th February, 1929.

P. C.

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Held further that even otherwise the fact that the physical site of the college buildings was at the date of suit upon adjoining land and that the demised land was being used for purposes of the college other than the actual teaching in a class room would not be such a cessation of the use of the land for the purposes of a college as to entitle the lessors to determine the lease.

Held also, that the High Court was right in holding that the value of the right existing in the lessors of the land was established by capitalizing the monthly rent.

Appeal No. 161 of 1927 from a judgment of the High Court of Calcutta reversing the judgment of the District Judge of Dacca.

De Gruyther, K.C. and *Wallach* for appellant.

Dunne, K.C. and *K. Brown* for respondent.

5th Feb. 1929. Their Lordships' judgment was delivered by

Lord Chancellor.

LORD CHANCELLOR.—This is an appeal from a judgment of the High Court of Calcutta reversing the judgment of the District Judge of Dacca. The question in issue turns upon the construction to be placed upon a lease made in the year 1887 between the predecessor-in-title of the present appellants and one Kishori Lal Roy Chowdhuri, his lessee. By that lease the lessors granted to Kishori Lal Roy Chowdhuri a lease of certain property in Dacca. The lease commences with the recital that Kishori Lal Roy Chowdhuri had taken a lease of a house described as No. 73, the boundaries of which are set out in the document, and it recites that it is necessary for Kishori Lal Roy Chowdhuri to secure a house for a long period with the object of removing the insufficiency of accommodation and confirming the stability of a school and college which had been established thereon. Then it recites that the lessors are agreeable, according to the lessee's proposals, to keep the house on lease to the lessee as long as he likes. It goes on to stipulate for a monthly rental of 140 rupees and that the lessee shall not be entitled to give up the house before he prepares a house of his own for the school, and that the lessors shall not be entitled to take hold of the house unless the lessee gives up the same of his own accord. There are further provisions as to what is to happen with regard to buildings erected on the land in the event of the lessee giving up his lease, and the lease finishes with a statement that all the stipulations shall take force and effect against and in favour of the lessors, their heirs and representatives in succession and of the lessee, his heirs and representatives. After the execution of that lease the lessee carried on a school and college for some twenty years and in the year 1907 he executed an indenture of trust, by which he conveyed the lease

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and certain other properties to trustees, in order that they might carry on the college and school. In the year 1908 the school was removed to another site. The college continued to be carried on for the time being on this site. At some date between 1908 and 1910 the land adjoining the property demised was acquired by the trustees, and upon the land so acquired a new building was erected for the use of the college. The land, the subject-matter of the lease of 1887, appears thereafter to have been used partly as a hostel for students at the college, partly for superintendents' buildings, for a dining room, for lavatory accommodation and for a house for the lodge keeper. This state of affairs continued from 1910 to 1920, the trustees continuing to pay the monthly rent to the lessors, and no objection being raised by anyone to what was being done. In the year 1920 it appears that the Legislature desired to establish the college on a more permanent basis, and by Act No. XVI of 1920 the Indian Legislative Council enacted that the property comprised in the lease should be transferred to and vested in and held by the Governor of Bengal in Council. Some time in the year 1920, after the passing of this Act but before it had actually come into force, the Government determined to acquire the freehold interest in the land, and it then became necessary to ascertain the amount of compensation to be paid to the appellants for their interest in the land. The Collector assessed the interest on the basis that they were entitled to a perpetual rental of 140 rupees per month but that they had no substantial or marketable interest in the land beyond that amount. From that decision the appellants took the case to the Court, and the District Judge reached the conclusion that the effect of the Act to which attention has just been called, No. XVI of 1920, was to bring the lease to an end, and therefore that the appellants were entitled to have their interest in the land valued as a fee simple in possession. From that decision an appeal was taken to the High Court of Calcutta, and the Judges of the High Court reversed the judgment, taking the view that the lease was determinable only at the option of the lessee and that the value of the appellants' chance of receiving back the land was nothing at all, since it was quite plain that the effect of the Act was to put the college on a permanent basis Before their Lordships' Board Mr. de Gruyther, for the appellants, did not contend for the view adopted by the District Judge, but he said that the lease on its true construction only gave to Kishori Lal Roy Chowdhuri and his successors the right to remain in possession of the land so long

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as either the school or the college was actually carried on, on the site demised, which he explained to mean the school or college buildings must actually be upon the site. Their Lordships have considered the language of the lease of 1887, and they are unable to accept that construction. The lease in its terms declares that the lessors shall not be entitled to take hold of the house unless the lessee gives up the same of his own accord, and it proceeds to say that the lessee shall not be entitled to give up the house before he acquires a house of his own for the school and that the lessors are agreeable to the lessee keeping the house as long as he likes. But, even if it were true that under the terms of the lease the lessors were entitled to determine it upon the lessee ceasing to carry on a college or school there, their Lordships are quite unable to take the view that the fact that the physical site of the college buildings is now upon adjoining land and that the land is being used for purposes of the college other than the actual teaching in a class room would be such a cessation of the use of the land for the purposes of the college as to entitle the lessors to exercise any such right. In their Lordships' view this land has always been used and is being used for the purpose of the college; it is quite plainly intended to continue that use permanently and, that being so, they think that the conclusion reached by the High Court of Calcutta, that the value of the right existing in the lessors of the land is properly established by capitalising the monthly rent, is the correct view, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh.]

PRESENT:—LORD PHILLIMORE, LORD BLANESBURGH, LORD ATKIN, LORD SALVESEN AND SIR LANCELOT SANDERSON.

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Rani Srimati Krishna Kumari Devi .. *Appellant** (*Plff.*)

v.

Bhaiya Rajendra Bahadur Sinha Deo and another .. *Respondents* (*Defts.*).

Oudh Settled Estates Act of 1900—S. 18 (2) proviso—Estate placed under Act after will but before death of testator—Devise by will of bare

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life-interest, in, to daughter-in-law, subject to such life-interest to widow, and with gift over to heir-at-law of testator who might be living at death of daughter-in-law—Validity of bequest to daughter-in-law—Stranger—Bequest of settled estate to—Validity—Exclusion of testator's kindred from succession—Bequest to stranger when amounts to—Validity of—"Exclude" in proviso—Meaning of—Will—Construction—Intention manifest of testator—Giving effect to, though indirectly—Duty of Court—Dispositions in will—Validity of will with reference to—Test—Power of testator over property disposed of at time of his death.

S, a taluqdar, whose name was entered in Lists 1 and 2 prepared under S. 8 of the Oudh Estates Act I of 1869, owned three mahals, *B*, *L* and *U*, and certain furniture and moveables In 1906, *S* applied for permission to declare that Mahal *B* might thereafter become a settled estate subject to the provisions of the Oudh Settled Estates Act of 1900. The permission asked for was granted by notification, dated 24th April, 1908, and, on 21st May, 1908, *S*, by a statutory declaration made irrevocable and duly registered and published on the 5th September following, declared that Mahal *B* should thereafter be held subject to the provisions of the Act of 1900 aforesaid. While his application to Government was still in suspense, *S* executed and registered a will on 17th June, 1907 devising and bequeathing all his property and estate whatever and wheresoever situate, to his widow for her life, and subject thereto to his daughter-in-law for her life. The will provided that neither the widow nor the daughter-in-law should have power under any circumstances by sale, alienation, mortgage, or otherwise, to dispose or incumber the whole or any portion of the property bequeathed for any period extending beyond the term of her natural life. The will also provided that upon the death of the daughter-in-law, the property was to descend "to the person or persons then living who under the provisions of the said Act I of 1869" (Oudh Estates Act of 1869) "would be entitled to succeed thereto on the failure or determination of the limitations hereinbefore contained." *S* died in July, 1913.

Held, that the devise of Mahal *B* made by the will in favour of the daughter-in-law was invalid in virtue of the provisions of the Oudh Settled Estates Act of 1900 to which, at the testator's death, the Mahal was subject.

The devise of the Mahal to the daughter-in-law made by the testator was not a devise of an estate to be held by her "according to the provisions of (the) Act" within the meaning of the proviso to sub-section (2) of section 18 of the Act, because the devise to her did not carry with it the leasing power referred to in section 16 of the Act, and, by its terms, prevented her from becoming a fresh stock of descent. The devise to her was a devise of a bare life-interest shorn of the incidents attached, for the public benefit, to the statutory estate created by the Act. As such, it is a devise prohibited by this proviso. The gift to the daughter-in-law cannot be treated as a gift to her life of the rents and profits of the estate charged upon that estate in the hands of the first respondent, upon whom, as the testator's heir-at-law, the estate had devolved as an estate undisposed of during the life of the appellant (the daughter-in-law), because that would subject the estate or the profits thereof to a demand charge or incumbrance in her favour and, as such, it would be a gift made unlawful or ineffective within the meaning of the said proviso.

Quaere: Whether the devise to the daughter-in-law was also invalid as being "to a stranger so as to exclude from succession any person belonging to any of the classes specified in section 22 of the Oudh Estates Act, 1869" within the meaning of the said proviso. (168-9).

Quaere: Whether the testator had, by the first devise of Mahal *B* to his widow for her life, which in the event took effect, exhausted his testa-

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mentary power of disposition, and the bequest in favour of the daughter-in-law, and the gift over, were bad for that reason

Quaere Whether the word "exclude" in the proviso to sub-section (2) of section 18 of the Act ought to have a generous or a narrow signification attributed to it, and whether a bequest which merely delays the enjoyment of the estate by some one of the testator's kindred, but does not and cannot "exclude" such kindred "from succession" altogether is within the mischief provided against by the proviso

Except in the possible case of the stranger being a female who "under the ordinary law to which persons of her religion and tribe are subject would ('not') constitute a fresh stock of descent if she succeeded to the estate on an intestacy," a devise to a stranger otherwise valid necessarily excludes the testator's kindred and can only be valid if there are none to be excluded.

The proviso to sub-section (2) of section 18 of the Act does not prevent a valid devise of the settled estate being made to a "stranger" in any circumstances whatever.

The will of a testator without any intimation there to be found of any contrary intention, must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over that property at that time.

It would in an ordinary case be the duty of a Court of construction or administration to inquire whether within the limits of the law, the manifest intentions of the testator in favour of a devisee could not be given effect to albeit indirectly.

Appeal No. 139 of 1927 against a decree, dated the 20th December, 1926 of the Chief Court of Oudh (Stuart, C.J. and Wazir Hasan, J.), affirming (so far as the subject of the present appeal is concerned) a decree, dated the 18th November, 1926, made by Gokaran Nath Misra, J., sitting on the Original Side of the said Court in Original Suit No. 9 of 1926.

The present appeal to His Majesty in Council was preferred by the plaintiff in the said suit and the main question therein was whether the plaintiff-appellant was entitled under the will of her father-in-law to possession of 90 villages in Oudh which constitute Mahal Bhinga.

The suit was tried by G. N. Misra, J., who framed the following questions for consideration:—

(1) Whether the provisions of the Oudh Settled Estates Act apply to the will of the late Raja;

(2) Whether the plaintiff is a "stranger" under the law of the Mitakshara, and therefore under Act I of 1869; and

(3) Whether the conferment of a life-estate upon the plaintiff amounts in law to the exclusion from succession of

defendant No. 1 who is now admittedly the heir-in-law of the late Raja.

The learned Judge delivered judgment on the 18th November, 1926. He held that the plaintiff's claim to Mahal Bhinga under the late Raja's will was untenable, and recorded his conclusion on the three questions mentioned above in the following words:—

First question.—I, therefore, hold that the will of the late Raja of Bhinga which was quite valid at the time it was executed and which gave a life-estate to the plaintiff, could not be considered to be operative except so far as it conformed to the provisions of section 18 of Act II of 1900.

Second question.—I, therefore, unhesitatingly hold that according to the law of Mitakshara prevalent in the United Provinces the plaintiff being a widow of a son of the late Raja Udai Pratap Sinha, who predeceased his father, is not entitled to inherit any property of the late Raja. Being no heir under the Hindu Law and not having been specified in any of the clauses of section 22 of Act I of 1869 she must be deemed to be a "stranger" within the meaning of section 18 of the Oudh Settled Estates Act II of 1900.

Third question.—I am, therefore, of opinion that when the Raja gave a second life-estate to the plaintiff who is an absolute stranger as described above, he, in doing so, exceeded his powers under the proviso to clause (2) of section 18, since his act had the effect of excluding defendant No. 1 from succession. In my opinion a person who is entitled to succeed is entitled to take immediate possession of the estate to which he has succeeded, and if by any act of the holder of the settled estate his succession is postponed indefinitely he must be deemed to have been excluded. A postponement of succession to such a time when the heir-at-law may not succeed at all amounts in my opinion to his exclusion. I, therefore, hold that the effect of the conferment of a second life-estate on the plaintiff amounts in law to the exclusion of defendant No 1 who is admittedly the heir-at-law of the late Raja and comes within clause (5) of section 22 of Act I of 1869.

The learned Judge summed up his conclusion as to the above-mentioned issues as follows:—

"The result of my decisions on the three points is that after the declaration made by the late Raja on the 21st May, 1908, under section 12 of the Oudh Settled Estates Act (II of 1900) he became a person holding a 'settled estate' and the will executed by him must be considered to be governed by the provisions of the said Act and thus be operative only in respect of the estate possessed by him at the time of his death. The plaintiff is no heir

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under the law of the Mitakshara, and the conferment of a life-estate upon her was inoperative, by virtue of the proviso to clause (2) of section 18, since it was a bequest to a stranger and had the effect of excluding from succession defendant No. 1, who is an heir-at-law within the meaning of clause (5) of section 22, Act I of 1869. The effect of this is that the will, so far as it confers a life-estate upon the plaintiff in respect of Mahal Bhinga, consisting of villages Nos. 1 to 89 and 91 entered in List A attached to the plaint, which was a 'settled estate' at the time of the death of the late Raja, becomes inoperative."

The Trial Judge (Mr. Justice Misra), therefore, made a decree dismissing the plaintiff's claim to Mahal Bhinga, and from that decree the plaintiff appealed to the Chief Court of Oudh, and the appeal was heard by Sir Louis Stuart, Chief Judge and Wazir Hasan, J., who concurred with the judgment appealed against so far as Mahal Bhinga was concerned.

The learned Judges in their judgment say:

"Before the learned Trial Judge it was contended on behalf of the plaintiff that she was not a 'stranger' but that she was a person belonging to the last class of the classes specified in section 22 of the Oudh Estates Act, 1869 Before us, however, the contention was not reiterated and it was agreed that the plaintiff was a 'stranger' within the meaning of the proviso to section 18 reproduced above The broad contention is that a life-estate such as was devised in favour of the plaintiff does not on the determination of that estate interfere with the course of succession provided for in section 22 of the Oudh Estates Act, 1869. On the opposite side it is equally broadly contended that the intervention of a life-estate excludes from succession the heir-at-law."

Dealing with these contentions the learned Judges say:

"According to the proviso the devise of a settled estate is invalid if it is—

(1) not devised as an impartible estate to be held by one person only and according to the provisions of this Act, or

(2) made subject or the profits thereof are made subject to any demand, charge or incumbrance whatsoever, or

(3) in favour of a stranger so as to exclude from succession any person belonging to any of the classes specified in section 22 of the Oudh Estates Act, 1869

It appears to us that the words 'so as to exclude from succession any person belonging to any of the classes specified in section 22 of the Oudh Estates Act, 1869' are intended to define a 'stranger.' Accordingly a devisee is a stranger if he or she has no place in the line of succession prescribed by clauses (1) to (11) of section 22 of the Oudh Estates Act, I of 1869. That the plaintiff in the present suit is such a devisee is now admitted We think that the intention of the proviso is not to permit an intermediate estate howsoever limited between the death of the testator and the succession of the heir-at-law if the devisee of such an estate is not a person answering the description of any of the heirs specified in section 22 of the Oudh Estates Act, 1869 We are convinced that such an intention is manifest from the second element of the proviso. A claim or demand on the basis of devise for the enjoyment of profits of the settled estate during one's life-time is clearly forbidden by that element. A life-estate is a higher estate than a right to the enjoyment of profits for life if it is not the same."

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The learned Judges say further:

"The second point urged in support of the appeal is that the execution of the Raja's will having preceded the declaration under section 10 of the Oudh Settled Estates Act, 1900, it is not subject to the provisions of section 18 We are of opinion that the contention has no substance There can be no doubt that as soon as the declaration under section 10 was made the estate of Bhinga acquired the character of a 'settled estate' within the meaning of the Act. The description of the property in respect of which the devise was to take effect therefore includes the characteristics of a "settled estate' and as a will speaks and takes effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears, it must be held that the Raja's will relates to a 'settled estate' and is therefore subject to the provisions of section 18"

Upjohn, K.C., De Gruyther, K.C., Dunne, K.C., Wallach and *B. P. Singh* for appellant.

Macmillian, K.C., Lowndes, K.C., K. Brown and *Jopling* for respondents.

During the course of the argument, reference was made to Farwell on Powers; Succession Duty Act, 1853, section 10, and *Attorney-General* v. *Sandover*,[1] as to the interpretation of the word "stranger," and Wilson's Mahomedan Law, 3rd Edn., page 379 was cited, to show who is a "stranger" for purposes of pre-emption.

21st Feb. 1929. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The sole question for decision on this appeal is whether a devise of the estate of Bhinga in Oudh made by the will of a former Raja of Bhinga in favour of his daughter-in-law, the plaintiff-appellant, is invalid in view of the provisions of the Oudh Settled Estates Act, 1900, to which, at the testator's death, although not at the date of his will, the devised property was subject. By a judgment and decree of the Court of first instance of the Chief Court of Oudh, affirmed in this respect by a judgment and decree of the Court of first appeal, dated the 20th December, 1926, the devise has been held to be invalid. Hence the present appeal by the devisee.

The testator, Raja Udai Pratap Sinha Deo Somayaji, was the last male holder of the estate of Bhinga. He was a *taluqdar*, and his name is entered in Lists 1 and 2 prepared under S. 8 of the Oudh Estates Act I of 1869, to which it will be convenient to refer as the Act of 1869. In 1906 the Raja was desirous that his Mahal Bhinga should become a settled estate subject to the provisions of the Oudh Settled Estates Act, 1900—

1. (1904) 1 K B 689.

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an Act which similarly will be referred to as the Act of 1900. He was in 1906, and he remained until his death, owner of two other mahals—Mahal Lakma and Mahal Usraina—and also of certain furniture and moveables. Over these further properties he was then, and apparently he desired to remain, possessed of full disposing power. It was only Mahal Bhinga that he was desirous of bringing under the restrictions of the Act of 1900, and his application to the Local Government Board related to that mahal alone. The application—one for permission to declare that the mahal might in future become a settled estate held subject to the provisions of the Act of 1900—was made in the same year, 1906. In final response to it, the Local Government Board, by notification, dated the 24th April, 1908, granted the permission asked for, and the Raja on the 21st May, 1908, by a statutory declaration made irrevocable and duly registered and published on the 5th September following, declared that Mahal Bhinga should thereafter be held subject to the provisions of the Act of 1900. And such was its position at his death on the 13th July, 1913.

The will of the Raja in which is contained the devise of the mahal now disputed was executed by him on the 17th and registered on the 22nd June, 1907—that is to say, while his application to Government was still in suspense.

On this circumstance has been based a contention for the appellant which, although less strongly urged than others presented on her behalf, may, not inconveniently, be dealt with at once, being, as it is, first in logical order, and involving, as it does, no other considerations than such as are peculiar to itself. The contention is that the validity or otherwise of the devise of Mahal Bhinga to the appellant must be determined regardless of the provisions of the Act of 1900, inasmuch as only at a date subsequent to the execution of the testator's will did the mahal in any way become subject to the provisions of that Act.

Their Lordships were not impressed by this contention any more than had been either of the Indian Courts. It may, indeed, they think, be summarily disposed of by reference merely to the well-known rule that the will of this testator without, as is agreed, any intimation there to be found of any contrary intention, must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over that property at that time.

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In the present instance, however, their Lordships are not required, in this matter, to have recourse to general principle. The testator, and in a sense fatal to this contention of the appellant's, has disposed of it himself. Having recited at the outset of his will that he was a *taluqdar* within the meaning of the Oudh Estates Act, 1869; that he had recently applied for permission to declare that his estate of Bhinga should in future be held under the provisions of the Act of 1900; that his application was then still pending and that permission had not hitherto been either granted or refused, the testator proceeded to declare that in exercise of *inter alia* the testamentary powers conferred upon him by the Act of 1900 (if the same should be applicable) he was desirous of providing for the devolution and application of all his property, moveable and immoveable, including his estate of Bhinga, whether the permission aforesaid should be granted or refused, and whether in the former case the statutory declaration in pursuance thereof should or should not be executed and registered. And thereafter follow the dispositions of his will, including that now in debate.

It would be difficult, their Lordships think, to frame a form of exordium more clearly indicating that, in full view of the likelihood that the Mahal Bhinga might before his death become subject to the Act of 1900, it was the testator's desire that his dispositions thereof should nevertheless, in that event, have effect to the fullest extent thereby permitted. And it is not inconsistent with this view of the words he uses that the testator may well have supposed that the effectiveness of these dispositions would in no way be impaired by the Act.

In the result, therefore, whether this first contention of the appellant's be tested in the light of general principle or whether its soundness be checked by reference to the particular terms of the testator's will, the result is the same. And it may be expressed in the words of the learned Trial Judge. The will of the Raja, so far as it devised to the appellant an interest in the Mahal Bhinga, cannot "be considered to be operative except in so far as it conformed to the provisions" of the Act of 1900. How far then was this devise conformable to these provisions? That is the question which has now to be answered.

And first as to the gift itself. Its precise effect will not be missed if it be read with this preface, *viz.*, that the property referred to in the course of it has been previously described by the testator as "all my property and estate whatever and where-

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soever situate,'' and that the gift in the events which have happened became operative, if it has any validity at all, upon the death on the 30th April, 1926, of the testator's widow, to whom by the clause immediately preceding, and by the same form of words, had been given an interest in the property for her life. The actual words of the gift are as follows:—

''And subject as aforesaid . . . *I give* devise and bequeath my said property and estate to Kumar Rani Srimati Krishna Kumari Devi, my daughter-in-law, the wife of my only surviving son and heir for and during the term of her natural life but so that she shall have no power under any circumstances by sale, alienation, mortgage or otherwise, to dispose or incumber the whole or any portion of my moveable or immoveable property for any period extending beyond the term of her natural life.''

And the gift over may not be without importance.

''And upon her death in default of an adopted son if authorised by her husband to adopt a son I direct that my said property and estate shall descend to the person or persons then living who under the provisions of the said Act I of 1869 would be entitled to succeed thereto on the failure or determination of the limitations hereinbefore contained''

The testator has not, it will be seen, dealt with Mahal Bhinga separately from property over which in every event his powers of disposition were unfettered. The mahal is included in a general residuary bequest. Further, he has phrased his gift to the appellant in terms identical with the immediately preceding gift of the same property to his widow. In this, he has apparently considered himself at liberty to disregard the great difference which as will be seen, is made under the Act of 1900 between a testator's powers of devise of a settled estate in favour of a widow on the one hand and a daughter-in-law on the other. The draftsman may nevertheless in the result have conformed to the restrictions of the Act of 1900. But he has not been too sensible of their existence.

And at this point, in view of the provisions of that Act, to which close attention must later be directed, it will be convenient to accentuate three further things in relation to these quoted words of gift.

First, the interest taken by the appellant under them is, in the strictest sense, an interest for her life only. She is expressly debarred under any circumstances or by any form of alienation from disposing of the whole or any portion of the property for any period beyond her own life. Any lease granted by her, for example, must determine with her death.

Secondly, the appellant does not—and neither did the widow—become under the gift a fresh stock of descent of any

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of the property bequeathed. On the death of the widow Mahal Bhinga, according to the gift, passed to the appellant; on the death of the appellant it is to pass under the gift over to persons who must be strangers in blood to herself.

Thirdly, the destination under the gift over, on the death of the appellant, is not, putting it broadly, to the heir-at-law of the testator at his own death. The gift is, in effect, to the person or persons living at the appellant's death, who, under the provisions of the Act of 1869, would have been entitled to the testator's property had he at the same moment died intestate with reference to it. In other words, the only other testamentary gift of the mahal, in the events which have happened, is in favour of persons unascertainable up to the moment of the appellant's death. There can under the will be no vested interest in remainder or otherwise so long as she lives. The significance of these things or of some of them in their relation to the provisions of the Act of 1900 never unimportant may here prove to be decisive.

The purpose of that Act is not doubtful. By the Act of 1869, taluqdars in the position of the testator here were deemed to have acquired a permanent heritable and transferable right in their estates. Every such taluqdar was thereby made competent to transfer during his lifetime by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of his estates. The order of succession to his estate, on his death intestate, is, with himself as the stock of descent, laid down in section 22 of the Act.

Now, in conferring this unrestricted power of testamentary disposition, the Act of 1869 had given effect to a policy not universally approved. The Act of 1900 to some extent revised or retraced that policy. Its purpose is set forth in the preamble. It had been found expedient "to make better provision for the preservation of certain estates and other immoveable property in Oudh." The Act, however, is facultative and permissive only. It does not become operative *proprio vigore*. It merely empowers, *inter alios*, any owner in the position of the testator here to make to Government, notwithstanding any enactment to the contrary, the application which, with reference to Mahal Bhinga, this testator did submit, and it provides that, as a result of the registration of the declaration which this testator did make, the property included in the declaration becomes a settled estate subject to the provisions of the Act. And the testator's declaration here having been expressed to be

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irrevocable, Mahal Bhinga, under the Act, became a settled estate for all time, unless for some such default of its owner, as is referred to in section 11, the estate is hereafter excluded from the Act by the action of Government.

In marked contrast with the powers of the Raja under the Act of 1869 were his powers over the estate after it had become subject to the provisions of the Act of 1900. No alienation for any greater or larger interest or time than during his life was valid. No part of the estate nor of its profits might be held to be or have been vested in him as its owner for any larger or greater interest in time than for his life and subject to the provisions of the Act.

But nearly as it approached thereto, it would not be correct to say that under the Act of 1900 the interest of the Raja in the mahal became no more than a mere life-interest of convention. By "the provisions of the Act" just referred to there were attached to it as inherent characteristics two incidents appropriate rather to an estate of inheritance than to an estate for life. By section 16 of the Act the Raja, as holder in possession of a settled estate, had vested in him the power to grant leases of the mahal or an part of it for a term not exceeding seven years, and with the consent of the Collector for a term not exceeding fourteen years. The provisions of sub-sections (2) and (3) of the same section, inserted clearly for the protection of the successor-in-interest of the holder in possession of a settled estate show, as their Lordships think, plainly enough, that this leasing power is by the Act attached as an incident to the estate of such a holder for the public benefit and in the general interest, and is one to be respected as such. And the second incident attached by the Act to his estate which distinguishes it from a mere life-interest, is that, as will be seen in a moment, on his death intestate the settled estate, with an exception which would not extend to the appellant, descends, as under section 22 of the Act of 1869, from each successive owner as a fresh stock descent. In truth the interest of an owner of a settled estate is not strictly under the Act either an estate for life or an estate of inheritance. It is a statutory estate which in its incidents partakes of the nature of both.

And this brings their Lordships to the section of the Act which deals with the devolution and so-called bequests of settled estates. Upon this section depends the validity or otherwise of the devise of Mahal Bhinga in favour of the appellant, already analysed. The section is as follows:—

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"18 (1) Notwithstanding the provisions of any contract or disposition to the contrary, every person for the time being entitled to a settled estate, being a male, or being a female who, under the ordinary law to which persons of her religion and tribe are subject, would constitute a fresh stock of descent if she succeeded to the estate on an intestacy otherwise than as a widow, shall constitute a fresh stock of descent for the purposes of section 22 of the Oudh Estates Act, 1869, and on the death of such person intestate the settled estate shall descend according to the provisions of that section.

"(2) Notwithstanding the provisions of any contract or disposition to the contrary, every person for the time being entitled to a settled estate who constitutes a fresh stock of descent according to sub-section (1) shall be competent to bequeath the same subject to the provisions of the Oudh Estates Act, 1869:

"Provided that such person shall not be competent to bequeath the same except as an impartible estate to be held by one person only, and according to the provisions of this Act, or to subject the same or the profits thereof to any demand, charge or incumbrance whatsoever, or to bequeath the same to a stranger so as to exclude from succession any person belonging to any of the classes specified in section 22 of the Oudh Estates Act, 1869."

Now, as might have been expected, if their Lordships, in their exposition of the Act, have correctly interpreted its scope and purpose, this power of bequest is very strictly limited. The owner of a settled estate thereby constituted a fresh stock of descent is not to be permitted by his will to invade that part of the scheme of the Act which has been enacted in the general interest. Clearly enough he is by this section given power by his will to select as his successor to the settled estate any person, tracing through himself, who belongs to any of the classes specified in section 22 of the Act of 1869. He may make the last of these first if he be so minded.

But may he do anything more, and, if so, to what extent and in what way? The answer to these questions is beset by doubts of varying intensity. Take, for example, the will of this testator. The first devise of Mahal Bhinga, which in the event took effect, was to his widow for her life. Even under the section the widow did not thereby become a fresh stock of descent. In these circumstances had the testator by that gift exhausted his testamentary power of disposition? It was the opinion of the learned Trial Judge that he had. Not only was the bequest in favour of the appellant bad for that reason: the gift over, even if it had been expressed to take effect on the death of the widow and if there had been no gift to the appellant, would, in his view, have been, as such, bad also. This aspect of the matter is not discussed by the Court of first appeal. And their Lordships also will leave a question so important undetermined until the necessity for deciding it arises. But, as a question, it remains.

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The present case, however, regardless of it, can in their view be better determined by bringing the validity of the devise in favour of the appellant to the tests set by the provisoes contained in the final paragraph of the section. Taking these provisoes in their order, their Lordships inquire, first, whether the devise of the mahal to the appellant made by the testator is a devise of the estate to be held by her "according to the provisions of [the] Act." And in their view the answer must be in the negative. Even had the appellant been a person within any of the classes specified in section 22 of the Act of 1869—as to this in a moment—a devise to her which did not carry with it the leasing power already described, and which, by its terms, prevented her from becoming a fresh stock of descent, was not, for reasons already given, a devise of an estate to be held by her according to the provisions of the Act. It is a devise of a bare life-interest shorn of the incidents attached, for the public benefit, to the statutory estate created by the Act. As such, it is a devise prohibited by this proviso.

But having so far found, it would in the ordinary case be the duty of a Court of construction or administration to inquire whether within the limits of the law the manifest intentions of the testator in favour of the appellant could not be given effect to albeit indirectly. And in the present case the obvious way of giving them effect would be for the Court to say that the interest given to the appellant might be treated as a gift to her for her life of the rents and profits of the estate charged upon that estate in the hands of the first respondent, upon whom, as the testator's heir-at-law, the estate had devolved as an estate undisposed of during the life of the appellant. And if not also prohibited by the Act such a determination by a Court of construction or administration would, in this case, be quite in accordance with principle. But, unfortunately for the appellant, the gift to her now becomes one which subjects the estate or the profits thereof to a demand, charge or incumbrance in her favour and, as such, it is a gift made unlawful or ineffective by the second proviso in the section. Accordingly the appellant's gift is defeated, whether it be tested by the requirements either of the first or of the second proviso.

But in the Court of first appeal and before the Board the invalidity of the gift was rested mainly on the provisions of the third proviso, and their Lordships in deference to the judgment appealed from and to the arguments of counsel before them feel that they ought not to close this judgment without

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some consideration of the appellant's position under that proviso. With reference to it, the appellant no longer contends that she is not a "stranger" within the meaning of that word as there used; she is not, in relation to the testator, within any of the classes specified in section 22 of the Act of 1869; she is not, under any other right, entitled to inherit, *ab intestato,* any property of the testator; she is therefore a "stranger." And upon this footing it was held in the Court of first appeal, and the view was pressed upon the Board by learned counsel for the first respondent, that the devise to her was, for that reason alone, invalid; the concluding words of the proviso "so as to exclude from succession any person belonging to any of the classes specified in section 22 of the Oudh Estates Act, 1869," being merely expository of the meaning to be attributed to the word "stranger." On the other hand, it was strongly contended by learned counsel for the appellant that the proviso cannot be so read. Its words in this respect are, he urged, too plain to admit of any construction save this, that a devise to a stranger is not thereby prohibited unless its effect is within the true meaning of the words to "exclude from succession," putting it shortly, any of the testator's kindred. And it was contended that the gift in favour of the appellant, while it might delay the enjoyment of the estate by some one of the testator's kindred, did not and could not "exclude" such kindred "from succession" altogether.

Now, their Lordships are impressed by the difficulties which beset both contentions. They feel first of all that the words are not strong enough to prevent a valid devise of the estate being made to a "stranger" in any circumstances whatever. If, for instance, a testator was so unusually circumstanced that he left behind him no person belonging to any of the specified classes, their Lordships can see nothing which, under the proviso, would affect in such a case the validity of a devise to a stranger otherwise unimpeachable. To them it does not seem permissible as a mere matter of construction to treat the concluding words of the proviso as being no more than a definition of the word "stranger." On the other hand, they have a difficulty in interpreting the word "exclude" so narrowly as does the appellant. If the question really arose in this case the question whether that word ought or ought not to have a generous or a narrow signification attributed to it would demand at their hand very serious consideration indeed. But the question does not arise now and, for a reason now to be stated, it can rarely if ever

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arise. If, as their Lordships have in effect held, a devise to a stranger, to escape destruction under the first proviso, must be a devise which constituted the "stranger" a fresh stock of descent, then such a bequest necessarily excludes, *as such,* and in the strictest sense, every person who traces his claim from the testator, under section 22. In other words, except in the possible case of the stranger being a female who "under the ordinary law to which persons of her religion and tribe are subject would" [*not*] "constitute a fresh stock of descent if she succeeded to the estate on an intestacy,'' a devise to a stranger otherwise valid necessarily excludes the testator's kindred and can only be valid if there are none to be excluded. In truth, the invalidity of this devise under the first proviso so destroys it that the application to the devise of the third proviso never arises.

On the whole case, in the result, their Lordships are of opinion that the decree of the Court of first appeal should remain undisturbed, and they will humbly advise His Majesty that this appeal therefrom should be dismissed, and with costs.

Solicitors for appellant: *Douglas Grant & Dold.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

Reporter's Note—It may be mentioned that the Oudh Settled Estates Act, 1900, has now been replaced by the Oudh Settled Estates Act (V of 1917), but in the present case the Courts were not concerned with the latter Act—K.J.R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Vaithilinga Aiyaswami Aiyar .. *Appellant** (*Plff.*)

v.

The District Board of Tanjore represented by its President .. *Respondent* (*Defdt.*)

Vaithilinga Aiyaswami Aiyar v. District Board of Tanjore.

Court Fees Act (VII of 1870), Sch II, Art. 17-B as amended by Madras Act V of 1922—Applicability—Madras Estates Land Act, S 112—Suit by ryot under—Second Appeal in—Court-fee payable on memo of

In a second appeal preferred by a ryot in a suit filed by him under S 112 of the Madras Estates Land Act, *held,* that the case was one where it was not possible to estimate at a money value the subject-matter in dispute within the meaning of Article 17-B of Sch II of the Court Fees Act

*S.R. No. 586 of 1929. 16th July, 1929.

of 1870, as amended by the Madras Act V of 1922, and that, for purposes of Court-fee, the case was, therefore, governed by that Article

Second Appeal sought to be preferred against the decree of the District Court of West Tanjore in A.S. No. 102 of 1928 preferred against the decree of the Court of the Sub-Collector of Kumbakonam in Summary Suit No. 52 of 1926.

K. Bhashyam Aiyangar for appellant.

The Government Pleader for respondent.

The Court made the following

ORDER.—The question that has been referred to me is, what is the amount of Court-fee payable in respect of a Memorandum of Second Appeal preferred by a ryot in a suit filed by him under section 112 of the Estates Land Act. Under that section, whenever a landholder expresses his intention to avail himself of the powers given to him under the Estates Land Act to sell the holding, he is bound to give, through the Collector, a written notice to the ryot. That section also provides that, if he (the ryot) does not pay the amount or file a suit within 30 days before the Collector contesting the right of sale, the said holding or any part thereof specified in the notice will be sold. In this particular case, the ryot contested the landholder's right to sell his holding under section 112. One of the reasons given by the ryot was that there was no proper notice. There were other objections also raised by the ryot. The suit was dismissed by both the Lower Courts. The ryot, when he preferred the Second Appeal to this Court, affixed a Court-fee stamp of the value of Rs. 10 to the Second Appeal Memorandum. The Office took objection to the amount of Court-fee that was payable, and as the Taxing Officer felt some doubt as to the exact amount of Court-fee payable in respect of the Memorandum of Second Appeal, the matter was referred to the learned Chief Justice, and under the orders of the Chief Justice the matter has been placed before me for adjudication as regards the exact amount of Court-fee payable.

The learned Advocate who appeared for the appellant, Mr. K. Bhashyam Aiyangar, contended that the present case is covered by clause 17 (*b*), Schedule II of the Court Fees Act, VII of 1870, as amended by the Madras Act V of 1922

"plaint or memorandum of appeal, where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for . . "

Under the notification issued by the Government, No 1245, dated the 15th of April, 1926, the Government were pleased

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"to reduce to Rs 15 the fees chargeable under Schedule II on a memorandum of second appeal in a suit of the class mentioned in Art. 17-B and instituted in a Revenue Court"

If this Article were to apply, then the proper Court-fee payable in respect of the Memorandum of Second Appeal before me would be Rs. 15. On the other hand, the learned Government Pleader contends that it could not be said that it is not possible to estimate at a money value the subject-matter in dispute in the present case (*Bunwari Lal* v. *Daya Sunker Misser*[1]) and he pointed out that, though under section 5 of the Estates Land Act, in respect of rent due to the landholder a charge on the holding is created by the Act, that charge is enforceable either by way of suit filed before the Revenue Court or by the landholder taking summary proceedings to realise the rent. If the landholder should elect to proceed, as he has done in the present case, by way of sale of the holding, then under section 112 the ryot is given the right to file a suit before the Collector contesting the right of sale of the holding. The question then narrows itself to this: what exactly is the meaning to be attached to the expression "where it is not possible to estimate at a money value the subject-matter in dispute" in clause 17 (*b*). In one sense no doubt it is possible to estimate, in however unsatisfactory a manner, the subject-matter in the present case, because as pointed out by the learned Government Pleader the question may have to be decided in this case as to what is the amount of rent payable by the ryot to the landholder in respect of which the landholder has taken proceedings by way of sale. But at the same time it is impossible to shut one's eyes to the fact that no question regarding the amount due might arise in some of the suits filed under this provision of law. For example, when the ryot disputes the landholder's right on the ground that no legal notice had been served upon him under section 112, the question that will have to be decided is whether such notice was served on the ryot or not. In such a case the liability of the ryot to pay rent, whatever it is, remains and it is not disputed that the landholder could, by means of a suit before the Revenue Court, recover the same by obtaining a decree and proceeding to execute the same, or he could start fresh proceedings after giving due notice under section 112, if he is otherwise in order. Learned Judges have had to consider the exact scope of the clause "it is not possible to estimate at a money value the subject-matter"

1. (1909) 13 C.W.N. 815.

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occurring in old Art. 17 (6) corresponding to the present Art. 17-B, and difference of opinion necessarily arose having regard to the nature of the expression used in that clause. With reference to a plaint filed under section 77 of the Indian Registration Act, Benson and Bhashyam Aiyangar, JJ., held in *Pydal Nambiar* v. *Kannan Nambiar*[2] that the subject-matter was manifestly capable of valuation, and the learned Judges directed that *ad valorem* Court-fee should be levied. In the case reported in the very next page of the same volume *Savarimuthu Pillai* v. *Alagiam Pillai*,[3] Davies and Moore, JJ., held that it was impossible to give any valuation, in the ordinary sense, in respect of such suits; and they held that the case came under the old Art. 17 (6) corresponding to the present Art. 17-B. It is not surprising in this state of circumstances, that the matter came before a Full Bench of this High Court, and in *Ramu Aiyar* v. *Sankara Aiyar*,[4] the Full Bench, following the decision of Garth, C.J., in *Jantoo* v. *Radha Canto Doss*,[5] held that in view of the wording of the Act the proper view would be to say that it is not possible to estimate at a money value the subject-matter in such suits.

Another class of cases, which in my view, would also throw some light on the meaning of the expression I have now to consider, arose in connection with suit for partition by co-tenants alleging possession in the plaintiffs and other co-tenants, and making the other co-tenants defendants. The question arose whether the subject-matter of such plaints could be estimated in money value and what was the proper Court-fee to be paid in respect of the same. After some difference of opinion it was held in *Gill* v. *Varadaraghavayya*,[6] by Wallis, C.J., and Sadasiva Aiyar, J., that in the ordinary acceptation of the expression such claims were not capable of money valuation within the meaning of Art. 17. Finally, the Court had to consider the meaning of this expression with reference to an appeal preferred from a decision passed by the Forest Settlement Officer from whose decision under section 10 of the Forest Act an appeal lay to the District Judge. The question arose as to the exact Court-fee payable in respect of the memorandum of appeal presented in such circumstances to the District Judge. The High Court held that the Forest Officer could not be said to be a Civil Court or a Revenue Court within the first clause

2. (1901) 12 M.L.J. 87 3 (1902) 12 M.L.J. 88.
4. (1907) I.L.R. 31 M. 89: 17 M.L.J. 573 (F.B).
5 (1882) I.L.R. 8 C. 515.
6. (1919) I.L.R. 43 M. 396: 38 M.L.J. 92.

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of Art. 17, and that the proper Article to be applied is the old Art. 17 (6), which corresponds to the present Art. 17-B. In the case before me, the plaintiffs-ryots raised (among others) the question that the notice under section 112 was not valid, since it was not signed by the defendant—the landholder—but by two others, who it was alleged, had no right to issue such notice; objection was also raised that the notice was not properly served. These pleas, though overruled by the Lower Courts, have been taken in the memorandum of second appeal also. Having regard to the decisions of this Court, where the Court had to consider the meaning that has to be attached to the expression in question, I think that I should, following the reasons adopted by this Court in the three classes of cases mentioned by me, decide that it is not possible to estimate at a money value the subject-matter in dispute in the present case. In a taxing statute, unless the matter is made reasonably clear, the parties are entitled to bring their cases under the less onerous provision of the Act, if there be no other objections in their so doing: see *Sekharan* v. *Eacharan*[7] and *Pathuma Umma* v. *Aliyammakkanath Moideen*.[8] But in the present case I am not satisfied that the intention of the Act was to bring such a case as the one before me within the *ad valorem* Court-fee provision. No question could arise with reference to plaints filed under section 112, because (though in the present case I understand that a Court-fee of Re. 1 has been paid on the plaint) under clause 35 of the Notification issued by the Government, the Government have been pleased to remit the fees chargeable in respect of plaints in suits instituted before the Collector under section 112, among others, of the Estates Land Act. The question could arise only with reference to the Court-fee payable in respect of appeals and second appeals; for the reasons I have given above, I have come to the conclusion that the present case before me is not a case where it is possible to estimate at a money value the subject-matter in dispute, and that being so, the present case is covered by Art. 17-B of Schedule II to the Act.

According to the recent notification referred to by me, namely Notification No. 1245, dated the 15th of April, 1926, the amount of Court-fee payable on second appeals preferred from decisions of Revenue Courts is Rs. 15. The appellant has paid a fee of Rs. 10 and he has accordingly to pay the difference of Rs. 5. I give three weeks' time for such payment.

A.S.V.

7 (1909) 20 M.L.J. 121

8. (1928) 110 I.C. 752.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTIAR.

Rallabandi Sobhanadri .. *Appellant** (*Plff.*)

v.

Syamala Ramireddi and others .. *Respondents* (*Defts.*).

Sobhanadri *v.* Ramireddi.

Civil Procedure Code (*V of* 1908), *Ss.* 10 *and* 47, *O* 20, *R.* 12—*Suit for specific performance of contract of sale, possession and damages—Absence of prayer for future mesne profits—Direction by the Court in the preliminary decree for ascertainment of future mesne profits—Fresh suit by plaintiff for such mesne profits—Maintainability—Application for enquiry into future mesne profits directed by decree—If one in execution.*

In a suit for specific performance of a contract of sale by the execution of a sale-deed in favour of the plaintiff by the defendants and for recovery of possession of the property and also for the recovery of a certain amount as damages, there was no specific prayer in the plaint for the awarding of future mesne profits and consequently, there was no allegation in the written statement traversing the right of the plaintiff to such profits. But the Court, however, gave a direction in the preliminary decree for the ascertainment of future mesne profits and for the passing of a final decree after such ascertainment Without putting in an application in the suit for the enquiry into such mesne profits, the plaintiff brought a fresh suit for the recovery of such profits.

Held, that the suit was not barred either by section 10 or section 47 or any other provision of the Civil Procedure Code.

An application under Order 20, Rule 12 of the Civil Procedure Code for an enquiry into mesne profits directed by the decree in a suit is not an application in execution attracting the provisions of section 47 and, consequently, a fresh suit to recover such mesne profits is not barred by section 47.

Second Appeal against the decree of the Court of the Principal Subordinate Judge of Kistna at Masulipatam in Appeal Suit No. 76 of 1925 (A.S. No. 90 of 1924, Sub-Court, Bezwada) preferred against the decree of the Court of the District Munsif of Bezwada in O.S. No, 3 of 1922.

P. Satyanarayana Rao for appellant.

P. Somasundaram for respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-appellant for the recovery of a certain sum of money on account of mesne profits for faslis 1328 and 1329 either from defendants 1 and 2 or from defendants 3 and 4. In the first Court, the plaintiff got a decree for a less amount and he preferred an appeal and the other side put in a memo-

*S.A. No. 1901 of 1925. 14th August, 1929.

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randum of objections. The Lower Appellate Court in dismissing the appeal and allowing the memorandum of objections, dismissed the plaintiff's suit on a preliminary ground that it is unsustainable.

In the written statement filed by defendants 1 and 2 they took an objection that this suit was barred under section 47, Civil Procedure Code, but no issue was framed on that point. In the Lower Appellate Court that question was, however, considered. The real position in this case is this. In the former suit between the same parties, the present plaintiff sued for specific performance of a contract of sale by the execution of a sale-deed in his favour by the defendants 1 and 2 and for recovery of possession of the property after ejecting defendants 3 and 4 therefrom and also for the recovery of Rs. 50 as damages (*vide* Ex. A). It appears from this that there was no specific prayer in that plaint for the awarding of future mesne profits. However, the Court which decided that suit gave direction in the decree that subsequent mesne profits should be ascertained and embodied in a final decree. Without making an application to that Court in that suit as required by sub-rule (3) of Rule 12 of Order 20, Civil Procedure Code, for an enquiry into mesne profits, the plaintiff has filed the present suit for the recovery of the same. It is perfectly clear that an application under Order 20, Rule 12 for the aforesaid purpose is not an application in execution attracting the provision of section 47, Civil Procedure Code. This is not a matter that must be decided under section 47, Civil Procedure Code, and, therefore, that section is clearly no bar to the maintainability of the present suit.

We have next to see whether under the Code there is any other bar to the maintainability of this suit The only section which seems to be applicable to a case of this kind is section 10. Civil Procedure Code. That section enacts that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. We have to see whether the issue arising in the present suit was also directly and substantially in issue in the former suit. As observed already, in the former suit there was not even a prayer in the plaint for the award of future mesne profits and consequently there could have been no allegation in the written statement traversing the right of the plaintiff in respect of future mesne profits. But, however, the Court under the wide discretion vested in it by

Rule 12, Order 20, Civil Procedure Code, chose to give a direction in the preliminary decree for the ascertainment of future profits and for the passing of a final decree after such ascertainment. It is admitted that till now the plaintiff has not put in any application in the former suit asking the Court to make an enquiry and ascertain the profits. That being so, it seems to me extremely doubtful whether the matter now in issue in the present suit can be deemed to have been a matter directly and substantially in issue in the former suit. According to Rule 1, Order 14, Civil Procedure Code, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. If regard be had to this section, it cannot be said that till after the filing of the application aforesaid, in the former suit, the question in issue in the present suit has also become a matter in issue in the former suit. We are now at a stage when it cannot be said that this matter has also been the matter in issue in the former suit. The mere fact that there is a provision in the decree for the ascertainment of mesne profits cannot be deemed to be a bar to the present suit unless a specific bar is shown to exist under section 10 of the Code or under any other provision contained in it. If section 10 cannot be applied to this case, there is no other provision in the Code precluding the plaintiff from filing this suit.

The suit being maintainable, it is unnecessary to go into the other question whether this suit can now be allowed to be converted into an application and, if so, whether such an application would be within time or not. I am of opinion that the decision of the Lower Appellate Court on this preliminary point is wrong. The decree of the Lower Appellate Court is set aside and the appeal is remanded to that Court for disposal on the merits. The parties in this second appeal will bear their respective costs and the other costs will abide the result of the appeal in the Lower Appellate Court.

(Court-fee paid on the Memorandum of Appeal will be refunded to the appellant.)

N.S. *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS.

C. Sachidanandam, Agent, Addison & Co., Ltd., Madras .. *Petitioner** (*Complainant*)

v.

V. Sowmya Gopala Aiyangar and another .. *Respondents* (*Accused*).

Sachidanandam v. Sowmya Gopala Aiyangar.

Criminal Procedure Code (*V of* 1898), *S.* 239—*Control of, by Ch XV of Code—Offences committed outside jurisdiction—Trial of—Jurisdiction merely by virtue of S* 239 *as regards.*

Jurisdiction being the foundation of the charge must be imported or understood as present in all the subsequent procedure set out in the Criminal Procedure Code It therefore clearly governs S. 239 of the Criminal Procedure Code.

In a case in which the 1st accused was charged with criminal breach of trust, the 2nd with abetment of that offence, and the 3rd with receiving the property the subject thereof under section 411, Indian Penal Code, it appeared that the abetment and the receiving took place outside the territorial jurisdiction of the Magistrate, though the breach of trust itself took place within his territorial jurisdiction, *held,* therefore, that the Magistrate had no jurisdiction to try the second and the third accused in virtue of the provisions of section 239 of the Criminal Procedure Code.

Bisseswar v. *Emperor,* (1924) 83 I C. 911 followed

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Presidency Magistrate, Egmore, Madras, in Calendar Case No. 7233 of 1927.

V. L. Ethiraj for petitioner.

P. Govinda Menon for *The Crown Prosecutor* on behalf of the Crown.

C. Narasimhachari for 2nd respondent.

The Court made the following

ORDER.—This case raises an interesting point This is a petition to revise the order of the learned Third Presidency Magistrate, dated the 3rd November, 1927. There were four accused. The first accused was charged with criminal breach of trust by obtaining from Messrs. Addison & Co. two motor buses on a hire purchase agreement, Ex. B. This man obtained the buses from Addison & Co. and signed the hire purchase agreement. The second accused also came to Madras with him and signed Ex. B and also the lien agreement. Ex. B is dated 23rd Sep-

*Cr. Rev. Case No. 124 of 1928 (Cr.R.P. No. 86 of 1928.) 2nd May, 1929.

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tember, 1924. On the 10th August by Ex. O the buses were transferred to the second accused at Madura, the hire purchase agreement having terminated on the 27th April, 1925 under its conditions, as the first accused did not pay the instalments due. On the 25th December, 1925, by Ex. Q, the second accused transferred them to the third accused at Madura. The learned Magistrate convicted the first accused, being convinced that he made a dishonest disposal of the buses and acquitted the second and third accused as he had no jurisdiction to try them. On the 26th February I made a reference to the learned Magistrate asking for his reasons why he held that there was no jurisdiction to try these two persons. He has returned an answer which helps neither side, because he says the offence was committed in Cochin, which is obviously wrong. Now the question I have to deal with is this. The second accused is charged with abetment of criminal breach of trust. The third accused is charged with receiving under section 411, Indian Penal Code. The question is, put very shortly, whether the Magistrate has jurisdiction to try the abetment and the receiving, which clearly took place outside his territorial jurisdiction here in Madras. The section which allows the Magistrate to try the first accused is S. 181 (2) of the Criminal Procedure Code, because the property which is the subject of the criminal breach of trust was clearly received by him within the territorial jurisdiction of the Magistrate here in Madras. There is no abetment in Madras, nor is there any receiving in Madras. Mr. V. L. Ethiraj, the learned Counsel for the petitioner, relies on section 239, sub-sections (*b*), (*e*) and (*f*) which allow certain persons to be tried together and the whole question really comes to this: is section 239 which occurs in Ch. XIX headed "Of the charge" controlled by or independent of the chapter as to "jurisdiction". Ch. XV, which begins with section 177, provides that "every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed". Mr. Ethiraj points out that there are no controlling words in the section that it is subject to provisions as to jurisdiction. On the other hand, Mr. Narasimhachariar points out that jurisdiction must always be the foundation of a charge and must be imported into section 239. The trouble is that except one case there is no authority to guide one in this matter and it is an extraordinary thing that both the learned gentlemen who appear say that they have searched for authority and found practically none and if this were not the end of the sittings I should be tempted to refer this matter to

Sachidanandam v. Sowmya Gopala Aiyangar.

a Bench. But both sides have asked me to give my own decision and I will do so to the best of my ability. The authority against Mr. Ethiraj's view is expressed in *Bisseswar* v. *Emperor*,[1] a decision of a Bench of the Calcutta High Court. There I think they clearly hold, though Mr. Ethiraj says that it was not necessary for the decision, that jurisdiction governs section 239, so that unless the matter comes within the territorial jurisdiction of the Magistrate in the first instance, he cannot avail himself of section 239 to try abetment, for instance, with the principal offence. I am doubtful about the matter, I must say. But giving the best consideration I can to it and with this expression of opinion of the Calcutta High Court, I am inclined to think that jurisdiction being the foundation of the charge is to be imported or understood as present in all the subsequent procedure set out in the Code; and if that is so, it clearly must govern section 239. I am therefore of opinion that the learned Magistrate was right in acquitting the second and third accused though not for the reasons he gives and the Criminal Revision Case must be dismissed. Of course nothing that I have said will operate to prevent the second and third accused being proceeded against within the proper jurisdiction.

A.S.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

D. Viraswami Naidu .. *Petitioner** (*Accused*).

Viraswami Naidu, *In re.*

Indian Arms Act (XI of 1878), S 19 (d)—Indian Arms Rules, R. 22—Order for a gun from a dealer in Bombay—Transporting done by the Bombay dealer under license—Purchaser not owning license—Nature of offence committed.

Where the accused ordered a gun, without a license, from a dealer in Bombay ostensibly for an intending purchaser but in fact upon his own account, and the transporting was done by the dealer in Bombay and was duly covered by license, the accused is liable to prosecution, on receipt of the gun, for possessing it without a license under R 22 of the Indian Arms Rules, but he cannot be prosecuted under S 19 (*d*) of the Indian Arms Act for transporting the gun in contravention of the prohibition under S. 10.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Session of the Bellary Division in Criminal

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*Cr Rev Case No. 266 of 1929. 1st August, 1929.
(Cr. R.P. No. 237 of 1929.)

1. (1924) 83 I.C. 911.

Appeal No. 42 of 1928 preferred against the judgment of the Court of the Joint Magistrate of Hospet in C.C. No. 61 of 1927.

V. K. John for petitioner.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted under S. 19 (*d*) of the Indian Arms Act of transporting a weapon in contravention of a regulation or prohibition issued under S. 10 of that Act, and the conviction has been upheld on appeal. The learned Sessions Judge has set forth the relevant facts in paragraph 2 of his judgment and they have not been disputed before me. They show that the petitioner ordered a gun from a dealer in Bombay ostensibly for an intending purchaser but in fact upon his own account and, as the learned Sessions Judge says, the only question is whether his act amounts to the offence of transporting without a license.

Rule 24 of the Indian Arms Rules provides for the grant of a license, for the transport of arms, ammunition or military stores, and the form in which it is granted is Form VII. I think it is clear both from the language of that rule and the contents of the Form that where arms are to be sent from one place to another, it is for the consignor and not for the consignee to apply for and obtain the license. Sub-rule 1 (*a*) of Rule 24, for instance, requires that where arms are consigned from a Presidency Town, the license must be granted by the Commissioner of Police of that town; and it is evidently the consignor's name and place of business that must appear in columns 1 and 2 of the license. Further it is laid upon him to mark legibly on each packet an account of its contents (Condition 3) and Condition 4 states that the article should be delivered only to a person lawfully entitled to receive it. From these circumstances I draw the conclusion that the transporting was done by the dealer in Bombay and was duly covered by license. Rule 22, which relates also to the transport of arms, authorises a licensed dealer to transport any reasonable quantity to any person licensed to possess such arms. It appears to me that the petitioner, to comply with this provision, should have held a license to possess and if he was found to be without one he was liable to prosecution, on receipt of the weapon for possessing it without a license, but I do not think that the conviction under section 19 (*d*) can be sustained. I accordingly allow the petition and set aside the conviction and direct that the petitioner be acquitted and released.

N.S. *Petition allowed.*

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD CARSON, LORD ATKIN AND LORD SALVESEN.

Nuh Ullah Khan and others .. *Appellants** (*Defts.*)

v.

Mohammad Shafiq Ullah Khan .. *Respondent* (*Plff.*).

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Nuh Ullah Khan *v.* Mohammad Shafiq Ullah Khan.

Mahomedan Law—Legitimacy—Presumption from acknowledgment and treatment—Applicability of, where children proved to be issue of adulterous intercourse—Evidence of legitimacy—Near relations of parties concerned—Evidence of—Value of—Marriage—Admission by husband of—Collusive litigation between him and children of his claiming to be legitimate if can be relied upon as an.

Plaintiff-respondent, the son of one *E*, a Sherwani Pathan, sued the appellants for recovery of possession of certain property of the said *E*. Appellants claimed the ownership of the suit property as being the sons of *E* by his second wife, and therefore the step-brothers of the plaintiff. Their case was that they were the children of one Mahmuda Begam, a Sherwani Pathan and a daughter of Mansur Khan, who was himself a Sherwani Pathan, and that their mother was the lawful wife of *E*. The plaintiff's case, on the other hand, was that the appellants were the sons of *E* by Musammat Durga, a Hindu married woman and the wife of one Cheta Dhobi, who was still alive at the time of the births of the appellants respectively.

The evidence admittedly showed that the connection between the appellants' mother and *E* had commenced many years, probably 50 years, before the trial, and that it continued regularly for about 40 years till the woman's death at *E's* house, about four years before the commencement of the action; that the appellants were brought up and treated by *E* as his legitimate sons, and that the plaintiff himself treated them in every way during his father's life-time as if they were his step-brothers.

The Appellate Court held, and there was ample evidence to justify the conclusion at which the Appellate Judges arrived, that the appellants were not the legitimate children of *E*, but were his children by a woman who was at the time proved to have been married, and that therefore no rules of presumption of legitimacy or marriage could avail the appellants.

Their Lordships affirmed the Appellate Court, which has reversed the Sub-Judge.

Whatever presumption may be raised from the facts (disclosed by the evidence as to treatment and recognition above set forth) cannot prevail against the conclusions, if they are supported by the evidence, that, as alleged by the plaintiff, the appellants were the children of a Hindu married woman, whose husband was still alive at the time of the births of the appellants.

Held, further, that the fact that, in a suit brought by the appellants, after the death of their mother, for the recovery from *E* of a sum of Rs. 170, alleged to be dower debt due to their late mother, *E* confessed judgment could not be treated as an admission by *E* that appellants' mother was his lawful wife, because the insignificant nature of the amount sued for and the fact that *E* allowed himself to be sued showed that the sole object of the litigation was to get up evidence of the factum of *E's* marriage with appellants' mother.

*P.C. Appeal No. 114 of 1927. 2nd May, 1929.

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On an issue as to legitimacy no better class of evidence can be produced than that of near relatives of the parties concerned.

Appeal No. 114 of 1927 from a judgment and decree of the High Court, Allahabad (Mears, C.J. and Mookerji, J.), dated the 8th June, 1925, under section 10 of the Letters Patent, reversing a judgment and decree of the High Court, dated the 16th of April, 1924, passed by Mr. Justice Sulaiman and confirming the judgment of the same date passed by Mr. Justice Kanhaiya Lal, and also reversing a judgment and decree of the Court of the First Additional Subordinate Judge of Aligarh, dated the 21st April, 1921.

The principal point for determination on the appeal to the Privy Council was whether the defendants-appellants were the legitimate sons of one Enayat Ullah Khan.

The Subordinate Judge decided in favour of the defendants. He thought that

"the mere fact that the defendants' mother was in the beginning a Hindu and wife of a Hindu does not help the plaintiff." . . . "It is no doubt true that the evidence called on defendants' behalf to show that their mother was a daughter of Pathan parents is not very satisfactory . . . For reasons given above I am of opinion that the defendants' mother was a duly married wife of Enayat Ullah Khan and that the defendants are their legitimate sons. And if there is any doubt about the marriage and legitimacy the acknowledgments made by Enayat Ullah Khan, by the plaintiff himself and by their near relatives are conclusive."

Against the said judgment of the Subordinate Judge, the plaintiff appealed to the High Court and his appeal was heard by a Bench composed of Sulaiman and Kanhaiya Lal, JJ., who on the 16th April, 1924, delivered separate judgments. Mr. Justice Sulaiman was of opinion that the appeal should be dismissed, whereas Mr. Justice Kanhaiya Lal thought that the appeal should be allowed. In the result the appeal was dismissed in accordance with the provisions of section 98, clause (2) of the Code of Civil Procedure, 1908.

Mr. Justice Kanhaiya Lal observed as follows in the course of his judgment:

"There is no suggestion that Cheta Dhobi had ever divorced Musammat Durga or that such a divorce was recognized by custom in the caste to which Musammat Durga and Cheta belonged. So long as Cheta was alive, no valid marriage or lawful connection could have been established between Enayat Ullah Khan and Musammat Durga, and no children born of the latter could, therefore, be deemed to have been born of a lawful connection between them. In fact, as pointed out in *In the matter of Ram Kumari*, (1891) I.L.R. 18 Cal. 264 and *Sundari Letani* v. *Pitambari Letani*, (1905) I.L.R. 32 Cal 871, no lawful marriage between the wife of a Hindu dhobi and a Muhammadan is possible so long as the husband of the former is alive. Even if Musammat Durga had embraced Islam after

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she had gone into the keeping of Enayat Ullah Khan her marital relations with Cheta could not have been absolved till the death of Cheta which took place 14 or 15 years ago, *i e*, till long after the defendants were born.

"The evidence of treatment and acknowledgment produced by the defendants is of little value, because a person who keeps a mistress and has children born of her is not likely to describe his children by her in the presence of his sons by his first wife and other relations as illegitimate

"No presumption of lawful wedlock can arise in the circumstances, because the woman was known to have been and did remain the wife of Cheta Dhobi when she went into the keeping of Enayat Ullah Khan or when the defendants were born The marriage of Mst Durga with Cheta can be presumed During the life-time of Cheta, Musammat Durga, his wife, could not have been lawfully married to Enayat Ullah Khan The decree for dower obtained by the defendants against Enayat Ullah Khan after the death of their mother was manifestly collusive. The plaintiff could not have been reasonably expected to contest that claim, as no relief was claimed against him. The claim was for a small amount and Enayat Ullah Khan evidently admitted his liability in order to make it appear that the defendants were legitimate and to enable them to obtain mutation of names in their favour after his death The manœuvre was, however, futile, as illegitimate children could not be legitimated in that way In *Muhammad Allahdad Khan* v *Muhammad Ismail Khan*, (1888) I L.R. 10 All 289 it was held that lawful paternity could not be established by acknowledgment where no lawful marriage was possible between the parents of the person acknowledged In *Syed Habibur Rahman Chowdhury* v. *Syed Altaf Ali Chowdhury*, (1921) 19 A.L.J. 414 their Lordships of the Privy Council, after pointing out the distinction between legitimacy and legitimation, observed —

"No evidence of treatment can be of any avail where the antecedent circumstances are known or patent as in this case A person who runs away with the wife of another and has children by her must run the risk of having his children branded as illegitimate."

Against the said judgment and decree of the High Court, dated the 16th April, 1924, the plaintiff filed an appeal under section 10 of the Letters Patent. This appeal was heard by Mears, C.J. and Mookerji, J., who delivered judgment on 8th June, 1925. They agreed with the judgment of Kanhaiya Lal, J., and held that the defendants were the children of Enayat Ullah Khan by a Hindu woman whom he kept as his mistress, and that, therefore, no presumption of legitimacy or marriage could arise. They therefore allowed the plaintiff's appeal and passed a decree in his favour.

The learned Judges, Mears, C.J. and Mookerji, J., in concurring generally with the observations of Kandhaiya Lal, J., concluded their judgment as follows:—

"It is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. *See* Privy Council case of *Habibur Rahman* v. *Syed Altaf Ali*, (1921) 19 A.L.J 414. Also *Allahdad Khan* v. *Muhammad Ismail Khan*, (1888) I.L.R 10 All. 289."

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Nuh Ullah Khan
v.
Mohammad Shafiq Ullah Khan.

Dunne, K.C. and *Wallach* for appellants.

H. R. Abdul Majid for respondent.

Dunne, K.C., argued that there was no satisfactory evidence that the appellants' mother was the wife of Cheta Dhobi.

Abdul Majid for respondent.—According to the Hindu Law, divorce is unknown. It has not been shown in this case that Mst. Durga was divorced or that a divorce was recognized by custom among the parties.

[*Lord Salvesen.*—You have to rebut the presumption of marriage by showing that this lady was the wife of a Hindu gentleman, who deserted her husband and went to live with Enayat Ullah Khan.]

2nd May, 1929. Their Lordships' judgment was delivered by

Lord Carson

Lord Carson.—The only point for determination in this appeal is whether the defendants-appellants are the legitimate sons of one Enayat Ullah Khan. The said Enayat Ullah Khan, who was a Sherwani Pathan, died on the 30th April, 1916. The plaintiff-respondent is the son of Enayat Ullah Khan, and he brought the present action against the appellants to recover possession of certain property of his father, Enayat Ullah Khan, the ownership of which they claimed as being the sons of Enayat Ullah Khan by the second wife, and therefore the step-brothers of the respondent.

Whatever may have been the earlier contentions of the respondent, the case on the evidence at the trial was that the appellants were the sons of Enayat Ullah by Musammat Durga, the wife of one Cheta Dhobi, who used to live in the Mauza Enayati and who was still alive at the time of the births of the appellants respectively.

The appellants, on the other hand, claimed and made the substantive claim that they were the children of one Mahmuda Begam, a lady of Sherwani Pathani clan, to which Enayat Ullah Khan admittedly belonged, and not a Dhobin, that she was the daughter of Mansur Khan, and was the lawful wife of Enayat Ullah Khan.

The Additional Subordinate Judge of Aligarh, before whom the case was first tried, decided in favour of the appellants that they were the legitimate sons of Enayat Ullah, holding that the appellants' mother was a duly married wife of Enayat. From the judgment and decree of the Additional Subordinate Judge

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plaintiff-respondent appealed to the High Court, and his said appeal was heard by a Bench composed of Sulaiman and Kanhaiya Lal, JJ., who, on the 16th April, 1924, delivered separate judgments. The former Judge was of opinion that the appeal should be dismissed, whereas the latter thought that the appeal should be allowed; in the result the appeal was dismissed and a decree passed accordingly.

Against the said judgment and decree of the High Court the plaintiff appealed under section 10 of Letters Patent, and by a judgment, dated 8th June, 1925, the plaintiff's (respondent's) appeal was allowed, and a decree was made establishing his title to the property, the subject-matter of the action.

The matter now comes before the Board on an appeal by the appellants-defendants against such decree.

All the facts and circumstances of the case have been so fully considered from all aspects in the several judgments which have been delivered that their Lordships do not think it necessary to go at any great length into the details of the evidence. Their Lordships are of opinion that the judgment appealed from is right and that the learned Judges who delivered judgments had ample evidence before them to come to the conclusion at which they arrived, that the defendants were not the legitimate children of Enayat Ullah Khan, but were his children by a woman who was at the time proved to have been married, and that therefore no rules of presumption of legitimacy or marriage could avail the defendants.

It must be conceded upon the evidence, and indeed none of the Judges who have tried the case have found otherwise, that the connection between the defendants' mother and Enayat had commenced many years, probably fifty years, before the trial, and that it continued regularly for about forty years till the woman's death at Enayat Ullah Khan's house, about four years before the commencement of the action; that the defendants were brought up and treated by Enayat Ullah Khan as his legitimate sons, and that the correspondence produced shows that the plaintiff-respondent himself treated them in every way during his father's lifetime as if they were his step-brothers. It was certainly not an unreasonable finding by the Subordinate Judge that this fact raised a very strong presumption in favour of the marriage of defendants' mother and Enayat Ullah Khan, or, to use his own words, "a semblance of marriage." Their Lordships are of opinion that the Subordinate Judge was so im-

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pressed by this branch of the case that he failed to give full weight to the evidence of the substantive case proved upon behalf of the respondent. They agree with the appellate tribunal that whatever presumption may be raised from these facts cannot prevail against the conclusions, if they are supported by the evidence, that, as alleged by the respondent, the defendants were the children of Musammat Durga, a wife of one Cheta, and were not, as had been alleged by the defendants, the children of Mahmuda Begam, a Sherwani Pathan and a daughter of Mansur Khan, who was himself a Sherwani Pathan. It is in the contrast of the evidence supporting their inconsistent cases that it appears to their Lordships that the Subordinate Judge failed to realise the strength of the respondent's and the weakness of the appellants' cases respectively.

Without going through the evidence in detail it is proved by five close relations of Enayat Ullah Khan, including the respondent, that the defendants were the children of Musammat Durga, the wife of Cheta Dhobi, that their mother was a Dhobin by caste and not the daughter of Mansur Khan. One of these witnesses was a brother of Enayat Ullah Khan, another was his sister, a lady of 80 years of age, and another a sister some 60 years of age. Then there was a daughter of Enayat Ullah Khan's brother and her husband. Their Lordships agree with the appellate court in thinking that the Subordinate Judge was in error in rejecting too lightly the evidence of these witnesses on the ground that they were not independent and impartial, as it is impossible to see what better class of evidence in such a case as the present can be produced than by near relatives of the parties concerned. It is difficult to see why, if the story of the defendants was true, these relations would have any reason whatsoever to have any particular bias for the plaintiff in preference to the defendants, as they would be equally related to both of the parties, and certainly until the bringing of this action there seems to be no evidence of any hostility or unfriendliness between the parties. There is also other evidence of caste people and old residents of the village of Enayat itself, not connected with the family, who have come forward to support the plaintiff's case.

Now, in addition, there is the evidence of Baldewa, which is of the greatest importance, and, of course, if true, is conclusive of the plaintiff's case. He has sworn that he was a son of Cheta and that his mother was Musammat Durga, that she became the mistress of Enayat Ullah Khan, and that after that

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Cheta kept a woman in his keeping, who gave birth to two sons, *i.e.*, Puran and Gobardhan, both of whom he alleged are living. There is nothing whatever proved against Baldewa, and he was admittedly the son of Cheta, and as Cheta only died about 15 years ago, and the two sons alleged to have been born, Puran and Gobardhan, are still said to be alive, it is impossible to conceive that, if he was making definitely false statements, it would not have been possible to produce evidence to show that his allegations were inventions, and who the wife of Cheta was. As the High Court has said,

"There is no reason why Baldewa should try to throw discredit on his mother, Musammat Durga, or involve his own family into disgrace if she had not actually left the protection of Cheta and gone to live with Enayat Ullah Khan "

It is to be observed that the Subordinate Judge, while describing Baldewa as the plaintiff's most important witness, gives no reason or makes no suggestion as to why he should not be considered a truthful witness.

If, therefore, the evidence put forward on behalf of the respondent is to be disbelieved, it follows that there was a deliberate conspiracy to make a false case and to suborn perjury without any reasonable or adequate suggestion as to why such a conspiracy should have been entered into. On the other hand, when the substantive case put forward on behalf of the appellants, viz., that the appellants' mother was Musammat Mahmuda Begam, a Sherwani Pathan and not a Dhobin, that her father was Mansur Khan, a Sherwani by caste, and that witnesses called for the appellants were present at the marriage, their Lordships feel no doubt that the High Court were entirely justified in disbelieving the evidence produced. Indeed, it is not clear how far, if at all, either the Subordinate Judge or the learned Judge of the High Court who supported him, relied upon this branch of the case put forward on behalf of the appellants, and the same learned Judge stated that he was prepared to admit that the defendants' mother did not belong to the brotherhood of Enayat Ullah Khan. Further, as the appellate court has pointed out,

"if Mansur Khan migrated to the village of Enayati, to which the parties belong, he must have had some means of subsistence, and, like most of the residents of the villages, must have been a cultivator This would leave some trace of his existence in the village records; but no such trace was available "

One other fact was relied upon by the appellants. It appears that, on the death of Musammat Durga, a suit was brought

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for recovery of Rs. 170 by the appellants against their father Enayat for the recovery of the dower debt alleged to be due to their late mother. Enayat confessed judgment in the suit, and this fact was claimed as an admission by Enayat of the fact that Musammat Durga was his lawful wife. All the Judges of the High Court have found that this suit was a collusive one, and having regard to the insignificant amount and the fact that Enayat allowed himself to be sued and a judgment obtained, it cannot be doubted that the sole object of the litigation was to have a record which could be put forward as supporting the factum of Enayat's marriage with Musammat Durga.

Contrasting, therefore, the evidence put forward in support of the affirmative cases made by the respondent and the appellants respectively, their Lordships can find no reason for differing from the reasoning and conclusion arrived at and set forth in the judgment of the High Court of the 8th June, 1925, and they will accordingly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondent: *Francis & Harker.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD SHAW, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Khoo Sain Ban .. *Appellant* (Plff.)*

v.

Tan Guat Tean and others .. *Respondents (Defts.).*

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Khoo Sain Ban v. Tan Guat Tean.

Specific performance—Debtor—Contract by, to transfer property in complete extinguishment of debt—Specific performance of—Creditor's right to—Acceptance by creditor of another property in part satisfaction of debt—Effect—Registration Act, S. 17—Debtor—Deed by, undertaking to convey property in liquidation of debt—Non-registration of—Charge if created by.

L, who was indebted to the appellant, gave him a document dated 2nd August, 1923, which ran as follows: "I confirm that we owe you nearly half a lakh of rupees, I shall convey you my property known as 'Mount Pleasant' as agreed by me to liquidate the amount as soon as I feel a little better." The title-deeds of the property were not handed over and no question of security, charge or lien on that ground arose.

After *L*'s death, his widow executed a registered deed in favour of the appellant transferring to him another property of *L* for the sum of

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*P.C. Appeal No. 65 of 1928. 11th March, 1929.

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Rs 15,000 and the appellant accepted the said transfer as "in part satisfaction of" the debt in respect of which the document of 2nd August, 1923, was given, and credited the sum of Rs. 15,000 towards that debt

On a question arising as to whether the appellant was entitled to (1) a specific performance, on the footing that the document of 2nd August, 1923, created an obligation to grant an out and out transfer liquidating the amount due in the sense of complete extinguishment of any existing debt, or (2) an equitable charge upon the property "Mount Pleasant" to which the document of 2nd August, 1923 related,

Held, that the acceptance by the appellant of a property valued at Rs. 15,000 in part satisfaction of the obligation of 2nd August, 1923 and in part payment of the sum due to him, and his crediting that part payment accordingly were a bar to his claim for a decree for specific performance of the contract by conveyance of the property, and

(2) that the document of 2nd August, 1923, was one which created a right, title or interest over immoveable property within the meaning of S. 17 of the Registration Act, that it was compulsorily registrable, and that, as it was not registered, no charge could be created by it.

Appeal No. 65 of 1928 from the judgment and decree, both dated the 20th April, 1926, of the High Court of Judicature at Rangoon on its Appellate Side (Rutledge, C.J. and Maung Ba, J.), setting aside a decree, dated the 8th May, 1925, of the same High Court in its Original Jurisdiction (Maung Gyi, J.).

For the purposes of the present report the material facts of the case are set out sufficiently in their Lordships' judgment.

The main question for determination on the appeal to the Privy Council was whether the appellant, a creditor of the estate of a deceased insolvent, was entitled to have his debt charged on the immoveable property of the said insolvent. The Trial Court decided in the affirmative. The Court of Appeal reversed the decision and held that the appellant could not claim a charge.

The learned Judges of the Court of Appeal, in allowing the appeal, made the following observations in their judgment:

"The law seems to be simple enough. In section 54 of the Transfer of Property Act it is laid down that a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms between the parties, and that such a contract does not of itself create any interest in or charge on such property We may point out that this law is a distinct departure from the English Law under which the purchaser by virtue of the contract of sale becomes in equity the owner of the property from the date of the contract So this principle of English Law has no application to places where the Transfer of Property Act is in force. [*Maung Shwe Goh* v *Maung Inn,* (1916) L.R. 44 I.A. 15: I.L.R. 44 Cal. 542: 32 M.L.J. 6 (P.C.).] The other point we have to consider is whether Khoo Sain Ban can claim any benefit under clause 6 (*b*) of section 55. Under that clause a buyer is entitled unless he has improperly declined to accept delivery of the property to a charge on the property as against the seller and all persons claiming under him with notice of the payment to the extent of the seller's interest in the property

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for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount.. What do we find here? The first contract was to convey the property in satisfaction of debts amounting to nearly half a lakh. But subsequently another small piece was accepted valued at Rs. 15,000 in part payment of the debts. The learned Judge held and we agree with him that that contract no longer existed. In the absence of a contract for sale we fail to see how any of the rights and liabilities of buyer and seller under section 55 can be enforced. For the above reasons the learned Judge was wrong in declaring a charge in respect of the balance of debt on the suit property"

Lowndes, K.C. and *Kenelm Preedy* for appellant.

Dunne, K.C. and *S. Hyam* for respondents.

Lowndes, K.C.—The appellant was entitled to specific performance or in any event to a charge as held by the Trial Court.

Dunne, K.C., for respondents.—The document created no legal charge on the property in question. Referred to S. 17 of the Indian Registration Act and the "Explanation" added by Act XI of 1927 as regards an agreement for sale.

[*Lord Tomlin.*—The recital of payment of the earnest money, etc., *qua* recital may not require registration, but there may be something else, which may bring it within the scope of the section.]

Referred to Lord Dunedin's judgment in *Dayal Singh* v. *Indar Singh*[1] and to the "Explanation" since enacted in section 17 of the Registration Act.

The intention of the Legislature in enacting the new Explanation was that a party shall not be deprived of the right to obtain specific performance, although the document created a charge. The document in the present case was not a contract of sale within the "Explanation."

Lowndes, K.C., in reply.—What we have sued for is, specific performance of the document, asserting that it is an agreement of sale. Supposing your Lordships hold it is not an agreement of sale, but an agreement to liquidate the debt out of the property, it amounts to an agreement to mortgage, and why should the appellant not have a decree for specific performance of the agreement of mortgage?

[*Lord Tomlin.*—Does it require registration?]

No: an agreement of mortgage never requires registration.

[*Lord Tomlin.*—Does not an agreement of mortgage create a charge and so require registration?]

[*Sir Lancelot Sanderson* referred to S. 17 of the Indian Registration Act.]

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1. (1926) L.R. 53 I.A. 214: 51 M.L.J. 788 (P.C.).

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The question is, does the document here create, in itself, an interest in immoveable property.

[*Lord Tomlin.*—In English Law, it is clear that the document would create an equitable charge. Is the law in India different?]

[*Sir Lancelot Sanderson.*—Section 17 (2) (5) of the Registration Act may possibly take it out of the statute.]

We have purely a statutory right in India.

[*Lord Tomlin.*—With regard to contract of sale, there is now an express provision made by the new Act of 1927, but no similar provision is enacted in regard to an agreement to mortgage.]

[*Lord Shaw.*—What is your position? Do you ask for specific performance of contract of sale or contract of mortgage?]

I submit that it is the agreement of sale of which we claim specific performance. That has been our case throughout.

[*Lord Shaw,* after referring to the plaint, observed.—You are asking for a declaration of charge and not for specific performance of any agreement to sell. In the plaint you do not refer to it as an agreement of sale. In your very first prayer, you ask for a declaration of charge.]

We are anxious to have specific performance of the agreement to sell.

Referred to *Dayal Singh's case*,[1] which held that an agreement of sale required registration. That was a very unfortunate decision, because it was an appeal from the Punjab, and it was erroneously assumed that the Transfer of Property Act applied.

[*Sir Lancelot Sanderson.*—The appeal was argued *ex parte* and the learned counsel was not aware that the Act was not in force in the Punjab.]

To meet the difficulty created by *Dayal Singh's case*,[1] Act XI of 1927 was passed. The new Explanation says that "the document shall not be deemed to require or ever to have required registration."

[*Lord Tomlin*.—The effect of the new Act is to wipe off that Privy Council judgment.]

Section 55 (6) (*b*), Transfer of Property Act, gives the buyer a charge, and the Act of 1927 lays down that the document, though it creates a charge, does not require registration.

1. (1926) L.R. 53 I.A. 214: 51 M.L.J. 788 (P.C).

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I submit that if your Lordships hold that the document in the present case does confer a charge, then according to the Act of 1927 such a document *never* did require registration. The "Explanation" says that when a document is nothing but an agreement to convey and recites that the whole or part of the purchase money has been paid in advance, that document shall not require registration. The fact that section 55 (6) (*b*) operates to give the buyer a charge, will not render the document compulsorily registrable.

11th March, 1929. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a decree of the High Court at Rangoon made in its Appellate Jurisdiction on the 20th April, 1926. It reversed a decree of the same Court made in its Original Civil Jurisdiction on the 8th May, 1925. In the case for the appellant the point to be decided is thus stated "The principal question in this appeal is whether the appellant is entitled to a charge upon certain property in Rangoon known as 'Mount Pleasant' as was found by the Trial Court or only to a money decree as held by the Court of Appeal."

It is unnecessary to repeat the facts of the case antecedent to the 2nd August, 1923. They are stated with sufficient particularity in the cases for the parties and in the judgments of the Courts below.

One Lim Chin Tsong, a Chinese resident in Burma, had acquired in 1909 a small plot of land of 1.871 acres in extent, part of "The Golden Valley Estate" in the district of Rangoon. In 1919 he also purchased two other properties, one of which was a house and land known as "Mount Pleasant"—the subject-matter of the present suit. Lim Chin died on the 2nd November, 1923. There had been a variety of business transactions between him and the appellant Khoo Sain Ban.

Some months before his death in November, namely on the 2nd August, 1923, Lim Soon Hean & Co., being the firm of which Lim Chin was the sole partner, gave to the appellant the document:—

Rangoon, 2nd August, 1923.

DEAR SAIN BAN,

I confirm that we owe you nearly half a lakh of rupees, I shall convey you my property known as "Mount Pleasant" as agreed by me to liquidate the amount as soon as I feel a little better

(Sd.) LIM SOON HEAN & CO

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The argument before the Board had reference to the proper construction of that instrument.

In 1924 his widow, the respondent No. 1, obtained letters of administration, and she executed in April of that year a registered deed in favour of the appellant transferring to him the first small plot of land mentioned, and the appellant Sain Ban accepted the said transfer as "in part satisfaction of" his debt which was stated to be Rs. 52,734. The price of the plot was Rs. 15,000, leaving a balance of Rs. 37,734 still due. In June, 1924, the estate was placed for administration in insolvency and the respondent No. 2 was appointed official assignee.

In September the appellant filed a claim as a creditor on the estate as per an account which included two sums of Rs. 1,000 and Rs. 2,800 said to have been advanced to respondent No. 1 after her husband's death. In that account the Rs. 15,000—the value of the small property transferred—is clearly credited and the final balance of Rs. 43,533 is followed by this statement:—

"This amount is covered by property known as Mount Pleasant with 792 acres freehold in 'Golden Valley' "

It is accordingly fairly plain that the appellant and his advisers viewed the transaction to be presently noted, as security, or cover for, or charge, upon "Mount Pleasant." The view, however, pressed upon the Board was of a more radical character, *viz.*, that the document fell to be construed as a still existent agreement for sale of which specific performance may be demanded at law.

The second "reason" for the appellant is:—

"The appellant was entitled to specific performance or in any event to a charge as held by the Trial Court."

By specific performance can only be meant a performance of this obligation, "I shall convey you my property known as 'Mount Pleasant'." As has been shown subsequent to the execution of that document the appellant had accepted a property valued at Rs. 15,000 in part satisfaction of the obligation of 2nd August and in part payment of the sum due to him, and had in fact credited that part payment accordingly. To grant specific performance would accordingly be to vest the property fully in the appellant in respect of an obligation which had been in considerable part extinguished According to one argument laid before the Board the appellant would have been permitted to realise the property and he would then stand in the position of a debtor to the estate of the vendor should more be obtained than was necessary to cover the remanent balance.

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In the opinion of their Lordships, looking to the facts of the transaction, specific performance of the obligation cannot be given or worked out on any such principle. On the general point of construction of the document taken as a whole there are two views. It may be argued for as an obligation to grant an out and out transfer, liquidating the amount due in the sense that no debt remained between the parties, the property having been given and accepted in complete liquidation, that is to say in the sense of complete extinguishment of any existing debt. Difficulties might have arisen as to this construction and as to its possible application to a position of affairs in regard to a property in respect of which Rs. 15,000 had been accepted in part satisfaction for the debt for which the land had been (as alleged) agreed to be sold. Their Lordships are of opinion that in the circumstances a decree for specific performance of the contract by conveyance of the property cannot be granted, and that the judgment of both of the Courts below on that topic is right.

The other view, however, is that, granted the payment of Rs. 15,000 as stated, the document as it stands provides sufficient grounds for an equitable charge upon the property, to the effect of enabling the appellant to rank as a secured creditor (he is of course an ordinary creditor) upon the estate of the grantor, now in liquidation. The first Court thought that it did: the High Court thought that it did not, upon reference to sections 54 and 55 (6) of the Transfer of Property Act. Their conclusion was that "in the absence of a contract of sale we fail to see how any of the rights and liabilities of buyer and seller under section 55 can be enforced."

The Board agrees with the result reached by the High Court, but thinks that the case can and ought to be disposed of in accordance with certain statutory provisions of the Indian Law, to which the attention of the Court below may not have been called.

It must be remembered that the title deeds of the property were not handed over and no question of security, charge or lien on that ground arose. The claim of the appellant arises solely upon the document, and is of the nature of an equitable charge. Such a charge can only found a claim in law if the provisions of section 17 of the Registration Act, 1908, are complied with. The provision is as follows:—

"17 (1) The following documents shall be registered. .... (*b*) other non-testamentary instruments which purport or operate to create,

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declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property."

It is plain that the document founded upon this record is one alleged to create a right, title or interest over immoveable property. Such a document, it is declared "shall be registered."

Further by section 49 it is provided as follows:—

"No document required by section 17 to be registered shall—

"(a) affect any immoveable property comprised therein, or

"(b) confer any power to adopt, or

"(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered".

These sections were applied in *Dayal Singh* v. *Indar Singh* [1] with a reference to the antecedent legislation and the provisions of the Registration Act were, of course, given effect to.

In the result accordingly, their Lordships are of opinion that the document was compulsorily registrable, that it was not registered, and that no charge can accordingly be created by it. It is unnecessary to proceed to the further general ground referred to in the judgment of the High Court.

Their Lordships will humbly advise His Majesty that the appeal fails with costs against the appellant.

Solicitors for appellant: *Stoneham & Sons.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE KRISHNAN PANDALAI.

Sir Gulam Muhammad Ali Sahib Bahadur Khan Bahadur, G.C.I.E., Prince of Arcot .. *Appellant**

v.

The Corporation of Madras .. *Respondent.*

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Madras City Municipal Act (IV of 1919), S. 111, Expl. 2—Pension in—Meaning of—Political pension, if included—Prince of Arcot—Allowance paid by Government to, if a "pension" within Explanation—S. 113 and Rule 8 of Taxation Rules—Profession tax—Liability for—Condition precedent to—Backward assessments—Power of Corporation as regards—Assessment backwards for six years—Validity—Reference to High Court under Rule 17 of Taxation Rules—Matter not referred to affected by opinion

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*Referred Case No 3 of 1928 19th March, 1929.

1. (1926) L.R. 53 I.A. 214: 51 M.L.J. 788 (P.C).

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of Court on matter referred to—Power of High Court—Rule 18 of Taxation Rules—Statute—Interpretation of—Hardship or inconvenience—Considerations of—Propriety—Taxing Statute—Interpretation of

The periodical payments made by the Government to the Prince of Arcot are equivalent to the receipt by him of a "pension" within the meaning of Explanation 2 to section 111 of the Madras City Municipal Act. The allowance made to him is a political pension

The word "pension" is used in the Explanation generally and without any qualification It should not therefore be limited to allowances drawn by retired holders of appointments in consideration of past services, and must be held to cover political pensions, as well as pensions in the ordinary sense of the word

The liability to pay profession tax arises, under the Madras City Municipal Act, only after assessment under Rule 8 of the Taxation Rules. The tax said to be "due" in S 113 of the Act is that to which the assessee has been first assessed under the powers conferred by Rule 8. The notice under S. 113 of the Act is the initial and essential step in the process of final determination of the tax according to the provisions for the revision of the assessment

The power of assessment conferred by Rule 8 of the Taxation Rules to be properly exercised must be exercised within the half-year to which the assessment relates; and it is not open to the Corporation to assess a person to profession tax at any future time within six years after the expiration of the half-year for which the assessment is made.

On a case stated under Rule 17 of the Taxation Rules of the Madras City Municipal Act, if the opinion of the High Court on the matter referred to affects another matter which has been left out from the reference, it is competent to the High Court under Rule 18 of the Taxation Rules to pass such order as it thinks fit

Statutes which impose pecuniary burdens on subjects must, in a case of reasonable doubt, receive the construction which is most beneficial to the subject.

Case stated under Rule 17 of the Taxation Rules of the Madras City Municipal Act, 1919, by the Chief Judge, Court of Small Causes, Madras, for the decision of the High Court on certain questions of law which arise in Municipal Taxation Appeal No. 4 of 1927 on the file of the Court of Small Causes at Madras.

T. Rangachariar and *M. Subbaroya Aiyar* for appellant.

S. Rangaswami Aiyangar for respondent.

The Court delivered the following

JUDGMENT.—The questions referred to us under Rule 17 of the Taxation Rules of the Madras City Municipal Act of 1919 are three in number:

(1) Whether the payments made by the Government to the Prince of Arcot are in the nature of pension and he is therefore a person in receipt of a pension within the meaning

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of Explanation 2 to section 111 of the City Municipal Act, 1919?

(2) Does the liability of any person to pay profession tax for any half-year arise immediately on the expiry of the sixty days mentioned in section 113, or does it arise only upon his being assessed by the Commissioner for that half-year under Rule 8 of the Taxation Rules and served with notice of such assessment?

(3) Is the assessment to profession tax of the Prince of Arcot under Rule 8 of the Taxation Rules and section 113 of the City Municipal Act made on the 5th of September, 1926 invalid for the ten half-years commencing from the second half-year of 1920-21?

The first question is whether the periodical payments made by the Government to the Prince of Arcot are equivalent to receipt by him of a "pension" within the meaning of Explanation 2 to section 111 of the Madras City Municipal Act. The material part of that section runs as follows:

"Every person not liable for companies' tax, who, within the City and for the period prescribed in section 113, exercises a profession, art, trade or calling or holds any appointment, public or private, bringing him within one or more of the classes of persons specified in the taxation rules in Sch IV shall pay by way of license-fee and in addition to any other license-fee that may be leviable under this Act a tax as determined under the said rules."

The intention of the section seems clear enough. Any person engaged in the active pursuit of a profession, art, trade or calling or holding any appointment, is liable to pay profession tax, if the income he enjoys therefrom brings him within any of the clauses specified in the schedule. If and when he retires he ceases to be liable. So far, however, as the holders of appointments are concerned, Explanation 2 provides that a person in receipt of a pension paid from any source shall be deemed to be a person holding an appointment within the meaning of the section. In other words, persons who have once held appointments are deemed to hold them for ever, while retired merchants, bankers, doctors and lawyers living on their invested funds seem to escape. Section 93 of the District Municipalities Act draws all classes in and makes, as it should, a distinction between holding an appointment and enjoying a pension. The learned Chief Judge has gone at length into the history of the negotiations between the Government and the Nawab of the Carnatic, which culminated in the agreement of 1867 by which the allowance now in question was fixed. It is not necessary

for us to do more than to refer to Ex. D, the final letter of the Chief Secretary to the Government of Madras, recording the agreement. The allowance is therein described as "settled on the title," "for the support of the title" and "attached to the title." Mr. Rangachariar relies on these expressions as showing that the allowance is no more than an appanage to the title and is not a pension properly so called. Periodical payments made by the State for the support of a title conferred by it certainly come within the definition of "pension." One of the definitions of the word in the Oxford Dictionary is "a regular payment to persons of rank . . . . to enable them to maintain their state." That definition covers the present case exactly. From another point of view, it is equally clear that the allowance is a pension. The consideration for it was the surrender by the Prince of certain rights. Webster's Dictionary gives, as one of the definitions of "pension," "a stated allowance or stipend made in consideration . . . . of the surrender of rights" Several decisions have been cited before us, wherein it was held that certain allowances paid by Government were political pensions. We think it unnecessary to refer to them. It seems to us perfectly clear that the allowance in question is a political pension. Mr. Rangachariar contends that the word "pension" in Explanation 2 should be limited to allowances drawn by retired holders of appointments in consideration of past services. The word is not defined in the Act, but we see no reason so to limit its application. It is used generally and without any qualification and must be held to cover political pensions as well as pensions in the ordinary sense. The first question is answered in the affirmative.

The second and third questions referred may be disposed of together. They raise the question whether the assessment of the appellant made on 15th September, 1926, for ten half-years commencing from the second half-year of 1920-21 and purporting to be made under Rule 8 of the Taxation Rules and section 113 of the City Municipal Act was valid.

The appellant was on 15th September, 1926, *i.e.*, within the first half-year of 1926-27, assessed to profession tax for that half-year and eleven previous half-years, or six years in all. The reference relates only to the first ten half-years of the above period apparently because the appellant did not question the opinion of the learned Chief Judge of the Small Cause Court who heard this matter that it was competent to the respondent to assess the appellant for the half-year in which the assess-

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ment took place and for one previous half-year, or a period of a year in all. It is not disputed that the respondent was authorised, if the appellant was otherwise liable to profession tax, to assess him for the half-year in which the assessment was made.

The dispute was about the eleven previous half-years and though the reference expressly relates to the first ten of those half-years, if the opinion of this Court in the matter referred affects the assessment for the eleventh half-year which has been left out from the reference, it is competent to this Court under Rule 18 of the Taxation Rules to pass such order as it thinks fit.

The argument for the respondent Corporation is firstly, that profession tax becomes due and owing as soon as the minimum period of sixty days required by section 113 has expired even without anything done on the part of the Corporation to assess it and inform the assessee of the amount payable and secondly, that even if the tax becomes due and owing only after assessment and intimation of the same to the assessee, it is open to the Corporation to assess a person to the tax at any future time within six years after the expiration of the half-year for which the assessment is made.

We think that these contentions cannot be upheld. In the first place the profession tax becomes due and owing not merely by the exercise of the profession, art, trade or calling during the period required by section 113, but by the assessment to the tax based upon such exercise. Reliance is placed on the words in that section that "if the tax due in respect of the half-year is not paid, the Commissioner shall cause a notice to be served on such person." But this section must be read with other provisions of the Act By section 138 the rules and tables embodied in Sch IV shall be read as part of Chap. V in which the sections relating to profession tax and other taxes occur. By section 111 profession tax is imposed upon persons who fall "within one or more of the classes of persons specified in the taxation rules in Schedule IV" and the amount payable is "a tax as determined under the said rules." Rule 8 of Sch. IV provides that persons shall be assessed by the Commissioner to the profession tax under one of the nine classes therein specified on a scale to be determined within certain limits by the Corporation from time to time. By Rule 9, the Commissioner is authorised in the case of persons not drawing a fixed salary to determine the class in which a person falls on certain general

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considerations but without calling for accounts from the assessee. Rule 12 gives an assessee to profession tax who is dissatisfied with the assessment by the Commissioner the right to apply to him for revision, provided the application is delivered to the Municipal Office within 15 days from the date of the service of the notice under section 113. This indicates clearly that the tax said to be "due" in section 113 is that to which the assessee has been first assessed under the powers conferred by Rule 8. It also shows that the notice under section 113 is the initial and essential step in the process of final determination of the tax according to the provisions for revision of the assessment; for until that notice is served and for 15 days thereafter the right of claiming revision is preserved. That notice has another importance because under Rule 22 the tax demanded may be distrained if it is unpaid for 15 days and the omission is not satisfactorily explained. Rule 14 provides that if the assessee is dissatisfied with the orders of the Commissioner on an application for revision, the application must be heard and decided by the Standing Committee and that a copy of the Committee's decision should be sent to the applicant within two days thereof. Rule 15 then confers on the assessee a right of appeal to the Small Cause Court provided notice of appeal is given to the Corporation in 10 days and the appeal itself is presented in 14 days from the date of the decision of the Standing Committee and the applicant has paid in the case of a tax leviable by half-yearly instalments (profession tax is such a tax) the half-yearly instalment due under the order appealed against. From the above provisions it is clear that the tax is not due till the Commissioner has assessed the person liable and that even then it is only provisionally fixed for it is liable to revision in the manner mentioned above.

A reference to the corresponding provisions of the Acts I of 1884 and III of 1904 shows that the machinery of assessment and revision which was provided for in those Acts in the body of the Act is in the present Act of 1919 relegated to Schedule IV The comparison is instructive as showing that the classification or assessment by the Commissioner is as essential now as it was under the former Acts. A bird's-eye-view of the comparative provisions of the two earlier Acts will be found in *Veeraraghavulu* v *The President of the Corporation of Madras.*[1] Under section 101 of the Act of 1884 corresponding to section 118 of the Act of 1904 the President was required to

1. (1910) I.L.R. 34 M 130 at 131, 20 M.L.J. 773.

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keep lists of persons liable to pay profession tax and other taxes. In Schedule IV of the present Act, Rule 1 requires the Commissioner to prepare and maintain property tax registers. Section 103 of the Act of 1884 corresponding to section 120 of the Act of 1904 made persons exercising a profession or holding an appointment in the City liable to pay profession tax. Section 111 of the present Act corresponds to this. Section 104 of the Act of 1884 corresponding to section 121 of the Act of 1904 empowered the President to determine in which of the scheduled classes any person was to be placed and to revise such classification from time to time. Now Rule 8 of Schedule IV empowers the Commissioner to assess persons to profession tax under one of the nine scheduled classes and Rule 14 empowers him to revise the classification. Section 106 of the Act of 1884 corresponding to section 125 empowered the President in case the tax due on assessment or revision was unpaid, to send a notice that in case the tax was unpaid for 15 days after service of the notice the defaulter will be prosecuted and those sections empowered such prosecution. Section 107 of the Act of 1884 corresponding to section 420 of the Act of 1904 empowered the Magistrate to impose a penalty of twice the amount of the tax. In the present Act prosecution for non-payment of profession tax has been done away with, but the notice mentioned in section 113 corresponds to the notice mentioned above and the present notice has two objects It enables the assessee if he so desires to apply in 15 days to get the assessment revised and the Corporation, in case the tax remains unpaid for 15 days without good cause, to distrain on the defaulter's goods. It follows that neither under the old Acts nor under the present can the profession tax be said to be "due" till the proper authority has assessed the same by the name of the assessee being placed in the proper class Under section 370 (*a*) of the present Act such act of classification or assessment should be evidenced by a writing signed by the Commissioner or by some Municipal Official delegated by him in writing under section 16, and it is noteworthy that under this last section the power of revision given to the Commissioner by Rule 14 cannot be delegated.

But it is urged that no time is fixed for the Commissioner to make the assessment and that it is therefore open to him to make assessments backward for a period of 6 years. This limit on the alleged power of backward assessment is suggested on the ground that the period of limitation for bringing a suit under section 396 for a tax after it has become due and owing is six

years. But, if the power of backward assessment exists, the limit suggested for its exercise disappears. For the right to sue accrues only after the tax has become due and if it becomes due, as we have held it does, only on assessment by the Commissioner, the period of limitation for any suit must begin from the date of the assessment. In other words, the contention for the Corporation leads logically to the result that, though once a tax is assessed and has become due, the Corporation has only six years to recover it by suit, yet the Commissioner is authorised to put off assessing persons to profession tax for an unlimited period and so put off indefinitely the due date of the tax and the liability of the assessee. The startling nature of this result is what compels the respondent to impose on himself a supposed limit, really illusory, of 6 years for the exercise of the power contended for. By itself this would be a strong ground for insisting upon explicit and clear foundation in the provisions of the Act and the rules thereunder for the existence of such a power. It is admitted that there is no express provision in the Act and the rules which confers any such authority. But it is said that there is also nothing which negatives it and in the absence of any such prohibition the authority must, it is argued, be deemed to exist. But on an examination of the scheme and purpose of the City Municipal Act and on general grounds of construction of similar enactments we are unable to read, by implication into that Act, the power contended for.

The scheme of imposition, assessment and collection of taxes laid down in the Act would seem to show that while the rate of taxation is fixed for each year beginning with 1st April by the Council at the Budget meeting in the February previous (section 156) the assessment of taxes payable by each individual is a contemporaneous operation within the period of taxation (year or half-year) in which while the Commissioner is afforded facilities for obtaining all relevant information on which the assessment is to be based (*see* sections 114, 115 and 368) the assessee is required within a very short time after the assessment to take all his objections to the assessment proposed (Rule 12 of the Taxation Rules). It is hardly consistent with this scheme that the tax fixed by the Council, say for 1920-21, in February 1920 should have to be assessed and realised from the individual tax-payers six years (as we have pointed out an unlimited number of years) later, when the Commissioner charged with the duty of assessment would find that all relevant information has ceased to be available and the assessee might long ago have

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ceased to exercise the profession and enjoy the income or salary from which he might be expected to pay the tax. In the case of Companies tax, to which similar provisions to those applicable to profession tax are applicable, the incongruity is still more marked. No big concern like a limited company with obligations to its shareholders which has to produce a balance-sheet in each working year and on the result of that balance-sheet to declare dividends to its shareholders could be carried on if its Municipal assessment in that year is uncertain and is liable to be suddenly demanded for several years together at a perfectly unknown and indefinite date. The learned Chief Judge has referred to other aspects of the hardship to which assessees would be put if the power contended for by the Corporation were upheld. We think it unnecessary to refer to them.

In Rule (6), Schedule IV of the Act it is expressly provided that when the Commissioner makes an amendment of the property tax register, as he is empowered to do under Rule (3) by altering, adding or deleting items therein, such amendment shall be deemed to have taken effect from the earliest date in the current year on which the circumstances justifying the amendment existed. This rule is remarkable both for what it enacts and for what it forbids. In the case of property tax if a property has escaped taxation for a period of years, the Commissioner may in any subsequent year by amending the register assess it to the tax But the rule says that the tax is to be operative only from the earliest date in the current year in which the omission was rectified. Similarly, if a property has been taxed too low, the Commissioner may amend the register. But in that case also the enhanced tax due to the amendment takes effect only from the earliest date in the year current when the amendment was made on which the property was liable to the enhanced tax. The careful prohibition against retrospective assessment in the case of property tax beyond the beginning of the current year is to our mind a very strong indication that in the case of other taxes like the profession tax retrospective assessment to a greater extent was not contemplated. Property tax is a yearly tax though payable half-yearly. Profession tax is a half-yearly tax. With this difference, if the analogy of the property tax may be used, the inference would seem to be that the power of assessment conferred by Rule 8 of the Taxation Rules to be properly exercised must be exercised within the half-year to which the assessment relates.

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Further, the companies tax imposed by section 110 and the profession tax imposed by section 111 are expressly by those sections levied "by way of license fee and in addition to any other license fee that may be leviable under this Act". The tax on carriages and animals imposed by section 116 is another instance of a license fee described as a tax. This is made clear by section 121 which says that when the tax due on any carriage or animal is paid the Commissioner shall grant the person a license to keep such carriage or animal for the period to which the payment relates and by section 360 which speaks of the license under section 121 in connection with the prosecution of a defaulter. The other license fees referred to are those leviable under Chap. XII of the Act and Sch. VI thereof read with section 365 (2). The essence of a license is that it is a permission which must be usually obtained before the thing licensed is done (Wharton's Law Lexicon, page 428). The City Municipal Act in several sections (*e.g.*, sections 287, 290 and 295) requires that the license mentioned therein should be obtained in respect of existing undertakings within the first month of the year and in respect of new undertakings before they begin and it is an offence to carry on an undertaking which requires a license without it. In the case of such licenses, those who ought to get them are expected to apply for and obtain them on payment of the fees fixed by the Council under section 365 (2). In default, they stand the risk of prosecution and the Magistrate is required in case of conviction to recover in addition to any fine that may be imposed the license fee and pay it over to the Corporation. But this coercive recovery of the fee does not entitle the convicted person to the license which if wanted must be obtained by further payment [section 365 (8) and (9)]. In the case of license fees described as companies tax and profession tax the amount of which depends on the rates fixed by the Council and on the classification of the particular individual in one of several classes (and this is true to a certain extent in respect of the tax on vehicles and animals) the fact that the levy is still declared to be by way of license fee strengthens the inference that the assessment is intended to be made before or during the period to which it relates and could not have been intended to be made long afterwards retrospectively for several periods together.

When the words of an enactment are clear and imperative, considerations of inconvenience or hardship have no place in its application to circumstances falling within the words. But where

there is no express indication in an enactment as to whether the powers given by it were meant to be used in particular circumstances, the fact that great hardship and inconvenience would result thereby is a reason for so construing the words as to meet all attempts to abuse the power either by exercising them in cases not intended by the statute or by refusing to exercise them when the occasion for their exercise has arisen. (Maxwell on Interpretation of Statutes, 6th Edition, page 226.) Statutes which impose pecuniary burdens are subject to the rule of strict construction and in a case of reasonable doubt the construction most beneficial to the subject is to be adopted (*ibid.*, pages 503 and 504) though the principle of strict construction is less applicable where the powers are conferred on public representative bodies for essentially public purposes (*ibid.*, page 530). The only inconvenience that may be urged to result from the Corporation not having the power contended for is that some persons who may have escaped taxation to profession tax in previous years cannot be assessed thereto in subsequent years. But the inconvenience, if such it really is, already exists in respect to property tax, for the most important source of Municipal revenue. And after all if the Municipal executive is vigilant and efficient such cases must be comparatively rare. On the other hand, a power to assess persons for many years retrospectively if granted is more likely to encourage slackness and inefficiency on the part of the Municipal executive and also will produce very great hardships on those who are suddenly called upon to pay in a lump sum the taxes which ought to be met out of current income. The present case in which the appellant was called upon to pay in addition to the tax for the current half-year a sum of Rs. 4,600 and odd on account of 11 half-years' arrears is a good illustration. We can find no justification for this either in the express terms of the Act or in any reasonable construction of its intention. The decision in *Gill* v. *Mellor. Gill* v. *Monday*[2] is no authority in favour of the respondent, as in that case the necessary steps had been taken in previous years to make the rate an arrear and all that remained was its collection. The decision was merely that when a rate is duly made and published, it is the duty of the parties concerned to seek the Collector and pay it. Having regard to the difference between the procedure prescribed for making and publishing the rates according to the English Acts and that prescribed for the assessment of property tax under

2. (1924) 1 K.B. 97.

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the City Municipal Act, the appellant not having been assessed at all in respect of the previous back years before 15th September, 1926, there were no arrears before that date.

Our conclusion on the second and third questions referred is that liability to pay profession tax arises only after assessment under Rule 8 of the Taxation Rules, and that the appellant, Prince of Arcot, not having been assessed in respect of the eleven half-years commencing from the second half-year of 1920-21, within the several half-years, the assessment of 15th September, 1926, was invalid in respect of those eleven half-years.

A.S.V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Juppalli Rajagopal Rao .. *Petitioner** (*Complainant*)

v.

Putheli Narayana Reddi and others .. *Respondents* (*Accused*).

Rajagopal Rao v. Narayana Reddi.

Criminal Procedure Code (*V of* 1898), *S.* 526 (3)—*Party interested—Meaning of—If includes police informant—Conduct of case in the hands of Public Prosecutor—Conflict between Public Prosecutor and party interested—Procedure.*

The expression "a party interested" in section 526 (3) of the Criminal Procedure Code does not necessarily mean only a complainant but may include a police informant. Where, however, the conduct of the case is in the hands of the Public Prosecutor and there is a conflict between the Public Prosecutor and "the party interested," the right of the former must prevail.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue an order directing re-transfer of C.C. No. 34 of 1929 from the file of the Stationary Sub-Magistrate of Gudur to the file of the Stationary Sub-Magistrate of Venkatagiri.

K. S. Jayarama Aiyar for petitioner.

C. Narasimhachariar for 1st to 4th and 6th respondents.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—Following the view of Mr. Justice Jwala Prasad in H.C. Cases No. 42 and of the learned Judges in *Sheodhari Rai* v. *Jhingur Rai*[1] and *Bagh Ali* v. *Muhammad Din*[2] I accept that the expression "a party interested" in section 526 (3) of the Code of Criminal Procedure does not necessarily mean only a complainant, *i.e.*, a person presenting a "complaint" as defined

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*Cr M P No 643 of 1929 — 15th August, 1929

1. A.I.R. 1925 Pat 818.

2. A.I.R. 1926 Lah 156.

Rajagopal Rao v. Narayana Reddi.

in section 4, cl. (h) of the Code, but may include a Police informant. To this however, following the same authorities, I would join the principle that where the conduct of a case is in the hands of a Public Prosecutor, and where there is a conflict between the Public Prosecutor and "the party interested," the right of the former must prevail. This principle derives support from the circumstance that it is the Public Prosecutor and not the informant who is primarily responsible for the conduct of the case. In the present case, the petitioner who applies for the re-transfer of the case is a Forest Official of the Venkatagiri Estate, and he did no more than give information in the course of his official duties.

The re-transfer here is opposed both by the Public Prosecutor and by the accused. I am not prepared to say that there were not grounds for the Sub-divisional Magistrate's order, although it may be that they do not appear on the face of his order. It is said that to order a transfer because an accused person apprehends inconvenience at Venkatagiri from the Maharaja's officials and sympathisers will entail the transfer of every case in which the Samasthanam is interested. I agree that that would be an indefensible course to adopt, and I can only express the hope that every such application is closely scrutinised upon its merits. I do not interfere in the present case but dismiss the petition.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

The Public Prosecutor .. *Appellant**

v.

Pakkiriswami and another .. *Accused* 1 *and* 2.

The Public Prosecutor v. Pakkiriswami.

Indian Penal Code (XLV of 1860), Ss 457 and 380—Charge of offences under—Proof of—Absence of direct evidence—Evidence Act, S 27—Statement extorted or elicited by inducement from prisoner—Admissibility—Evidentiary value—Practice—Acquittal by Trial Court by disbelieving oral evidence—Interference by Appellate Court—When justifiable

Where the only facts proved were that the house of the complainant was broken into and a quantity of property stolen, that the accused was arrested some miles off about 7 days afterwards as he was leaving by boat and from there he was taken to the police station where he made a statement with regard to the whereabouts of some of the property, that he was then taken to the place, which he had indicated, in the village in which the housebreaking and theft had taken place, that a search was made and a number of articles were recovered, and that there was correspondence

*Cr. Appeal No. 46 of 1929, 22nd August, 1929.

between the description of these articles in the report prepared then at the spot and the description of those mentioned in the complaint, but there was no direct evidence connecting the accused with the theft,

Held, that the prosecution had not established the complicity of the accused in the offence of housebreaking and theft.

Queen-Empress v. *Gobinda*, (1895) I.L.R. 17 A. 576, *Paimullah* v. *The King-Emperor*, (1911) 16 C.W.N. 238, *Emperor* v *Buta Singh*, (1916) 39 I.C. 330 and *Khushal Singh* v. *The Crown*, A.I.R. 1923 Lah 335 followed.

Obiter: A statement, even if extorted or elicited by inducement from a prisoner, will not thereby be rendered inadmissible under section 27 of the Evidence Act but its value will be very seriously affected.

It is only in very exceptional circumstances that a Court dealing with an appeal against an acquittal should reverse that finding by accepting oral evidence which the Trial Court, after enjoying the advantage of hearing the witnesses, has disbelieved.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sub-Magistrate of Tiruvarur in C.C. No. 567 of 1928 on his file.

N. S. Mani for appellant.

K. S. Vasudevan for 1st accused.

The Court delivered the following

JUDGMENT.—This is an appeal against the acquittal of two accused persons who were charged under sections 457 and 380, I.P.C., with housebreaking by night and theft in a building before the Second Class Magistrate of Tiruvarur. Efforts to obtain the presence of the 2nd accused have so far failed, so that I take the case only as against the 1st accused.

There is no question that the house of the first prosecution witness was broken into on the 19th August, 1928, and a quantity of property stolen. But there is no direct evidence to connect the present respondent with the theft. He was arrested—on what grounds does not appear—at Negapatam on the 26th August as he was leaving by boat for Singapore, and from there he was taken to the Police Station at Kivalur and the Sub-Inspector, P.W. 5, who effected the arrest says that he obtained a statement from him that same evening with regard to the whereabouts of some of the property. He was kept in the lock-up during that night and the next morning another witness, the Village Munsif of Kivalur, P.W. 6, spoke to the prisoner and also was the recipient of similar information. The respondent was then taken to the place which he had indicated, which is a tank in Kuthur, the village in which the housebreaking and theft had taken place. The Village Munsif of Kuthur,

P.W. 9, was then sent for and, at the Sub-Inspector's suggestion, questioned the respondent and was told about the secreted property. A search based upon the information given was then undertaken and a number of vessels, M.Os. 1 to 9, were recovered from the bed of the tank. These facts were recorded in Ex. A, written at the spot. It is further to be noted that there is correspondence between the description of these articles and certain of the articles mentioned in Ex. 1 on the 22nd August, 1928, by P.W. 1 as amongst the stolen property.

That is the whole of the prosecution evidence, and the first point that occurred to me was that it was not legally sufficient for the purpose of convicting the respondent of housebreaking and theft. As authority for that position may be cited *Queen-Empress* v. *Gobinda*,[1] which deals with the case in which an accused person pointed out the place where certain stolen property was concealed. It was a place, as is the tank in the present instance, which was not the peculiar property or within the sole control of the accused, but accessible to the public in general, and as the learned Judges very reasonably remarked,

> "if it is left doubtful whether the accused or some other person concealed the stolen article, or that the accused obtained in some other way information that the stolen property was in the place where it was found,"

such evidence of itself is not sufficient for a conviction. This case was cited with approval in *Paimullah* v. *The King-Emperor*,[2] where it was held that evidence of this character was not sufficient to convict an accused even under S. 411, I.P.C. and again in *King-Emperor* v. *Buta Singh*[3] and in *Khushal Singh* v. *The Crown*.[4] Following these decisions, I hold that the prosecution did not establish the respondent's complicity in the offence of housebreaking and theft.

I think, however, that apart from this consideration, there are no sufficient reasons for interfering here with the judgment of acquittal. The case depends upon the credibility of the two Village Magistrates and the Sub-Inspector and necessarily very considerable weight must be attached to the view taken of the oral evidence by the Trial Court. The learned Second Class Magistrate says that the statement elicited from the respondent, "in the nature of things, cannot be voluntary," and further that the evidence of the three witnesses is "stereotyped, looks artificial and is of a doubtful character." As regards the first of

1. (1895) I.L.R. 17 A. 576.
2. (1911) 16 C.W.N. 238.
3. (1916) 39 I.C. 330.
4. A.I.R. 1923 Lah. 335.

The Public Prosecutor v. Pakkiruswami.

these criticisms, it cannot, I think, be contended that a statement, even if extorted or elicited by inducement from a prisoner, will thereby be rendered inadmissible under section 27 of the Evidence Act, but there cannot be any doubt that its value must be very seriously affected. I have perused with care the depositions of the three witnesses and cannot indeed find any ground for believing them to be false. On the other hand, it would be idle to argue that Village Munsifs are not sometimes amenable to Police influence and in that respect perhaps they cannot be regarded as exceptionally independent witnesses. It must, I think, be only in very exceptional circumstances that a Court dealing with an appeal against an acquittal should reverse that finding by accepting oral evidence which the Trial Court, after enjoying the advantage of hearing the witnesses, has disbelieved. In the present case I do not feel prepared to accept such a responsibility.

I accordingly dismiss the appeal.

This appeal coming on for orders as against the 2nd accused in the presence of Mr. N. S. Mani for the appellant and the appellant requesting permission to withdraw this appeal as against the 2nd accused the Court made the following

ORDER.—The appeal against the 2nd accused is not pressed, and is dismissed. Process issued under sections 87 and 88 of the Code of Criminal Procedure will be withdrawn.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

P. R. Narayanaswami Chettiar .. *Petitioner** (*1st Respt.*)

v.

R. Subbaratnam Aiyar and another .. *Respondents* (*Petitioners*).

Narayanaswami Chettiar v. Subbaratnam Aiyar.

Madras District Municipalities Act (V of 1920), sections 52 to 58—Rules for the decision of disputes as to the validity of elections framed under the Act—Rule 11 (a)—Application to set aside election—Allegation that an offence under sections 52 to 58 had been committed—Duty of Court to enquire into—Proof that the election has been materially affected, if necessary—Possibility of conviction of the alleged offences on the evidence adduced, if necessary

For the purpose of Rule 11 (a) of the Rules for the decision of disputes as to the validity of elections framed under the Madras District Municipalities Act, it is not necessary that the election itself should be materially affected by the commission of any of the offences alleged.

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*C.R.P. No. 1602 of 1928. 9th August, 1929.

Narayanaswami Chettiar v. Subbaratnam Aiyar.

An allegation that an offence under any of the sections 52 to 58 of the Madras District Municipalities Act has been committed ought to be enquired into in an application under Rule 11 (*a*).

Athimoolam Servai v. *Gopalakrishna Kone,* (1927) 54 M.L.J. 269 followed

It is not necessary to set aside an election under Rule 11 (*a*) that a conviction should have been sustainable under the sections alleged on the evidence before the Court; it is enough if, in the opinion of the Court hearing such petition, the offence has been committed and there is evidence on record to support such conclusion of the Court

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Trichinopoly in O.P. No. 393 of 1926.

V. Ramadoss and *R. Purushotham Aiyangar* for petitioner.

T. R. Venkatarama Sastriar and *M. S. Vaidyanatha Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—This revision petition is filed against the order of the Additional Subordinate Judge of Trichinopoly in O.P. No. 393 of 1926 setting aside the election of the 1st respondent in the Court below to the 12th Ward of the Trichinopoly Municipality on the application of a voter.

The facts of the case may be stated thus: In October, 1925, a list of voters was prepared for the ward in question. This list contained 61 names which were not included in the previous list of voters. The election was held in September, 1926. Forty-one of the sixty-one new voters attended the election and voted. The petitioner who was then acting as an agent for the 2nd respondent, who was one of the candidates for the election, challenged these forty-one votes on the ground that they were not validly put on the electoral roll. Even when the names appeared in the preliminary list, Ex. A-3 objection was taken to the inclusion of these names, but the revising authority decided against the objection. The election resulted in the election of the 1st respondent by a majority of 270 votes. It is therefore clear that, even if the 41 voters were not entitled to vote, their inclusion in the electoral roll did not materially affect the election. The 1st respondent would have been successful in any event. But the application to set aside the election of the 1st respondent was made under Rule 11 (*a*) of the Rules for the decision of disputes as to the validity of elections. Rule 11 (*b*) does not obviously apply as the election has not been materially affected by the inclusion of the 41

Narayanaswami Chettiar v. Subbaratnam Aiyar

voters. The ground of the petition is that the 1st respondent, who was returned as the candidate, "has committed or abetted the commission of any of the offences described in sections 52 to 58 of the District Municipalities Act." Section 52 of the Act refers to the case of a person who does not possess the qualifications to vote claiming such qualifications or by any other deceitful means procuring improper entry of names in the electoral roll. Section 55 refers to the offence of a person who applies for a ballot paper at an election knowing that he is not qualified to vote thereat. The Subordinate Judge has found that the 1st respondent was guilty of the offence under section 52 (1) and of having abetted the offence under S. 55 and set aside the election. For the purpose of Rule 11 (*a*) it is not necessary that the election itself should be materially affected by the commission of any of the offences. The 1st respondent files this revision petition.

It is argued for him by Mr. Ramadoss that the electoral roll is final and that after the electoral roll was completed there can be no question of the offences being committed under section 52 or 55 of the Act and no such enquiry can be made. If this contention is correct, there would never be any scope for the operation of sections 52 and 55. But apart from this obvious consideration Mr. Ramadoss referred to some decisions of this Court. The decision in *Palanisami Pillai* v. *Srinivasaranga-chariar*[1] refers to the case of a candidate's name being wrongly entered in the electoral roll. It was held that the electoral roll was final. At any rate, there was no question in that case of any offence having been committed under sections 52 and 55. That case cannot, therefore, help the petitioner. In *Janardhanan* v. *Verghese*[2] it was held that no ground was made out for an enquiry under Rule 11. Krishnan, J.'s decision in that case is really against the petitioner. He there refers to Rule 11 (*a*) and observes:

> "I have looked carefully into the allegations in the petitions filed by the objectors in these two cases but I can find none there of any offence having been committed under section 52 by the candidates or their agents."

This observation shows that, if appropriate allegations had been made in that case, the learned Judge would have held that there was a case for enquiry and there being no such allegations it was held that the electoral roll was final. Even when there are such allegations it may be that the electoral roll is final in the sense that the voters who were wrongly put in the elec-

1. (1924) 47 M.L.J. 795 2. (1924) 48 M.L.J. 451.

Narayanaswami Chettiar v. Subbaratnam Aiyar.

toral roll are entitled to vote and their votes may be counted. But all this does not preclude any enquiry under sections 52 to 58. In *R. S. Naidu* v. *J. Ramier*[3] the election was for the office of the Chairman of a municipality and there was no question of an electoral roll or of any offence under section 52 being committed. The decision in *Latchmanan Chettiar* v. *Kannappar*[4] relates to an election in Madras and it was held that the Chief Judge of the Presidency Small Cause Court was not a Court. On the other hand in *Athimoolam Servai* v. *Gopalakrishna Kone*[5] my brother Jackson, J., held that an allegation that an offence under section 52 has been committed may be enquired into by the Court and ought to be enquired into. I entirely agree with this decision and with the observation at page 271. Mr. Ramadoss suggested that this decision was not followed in the matter of an election from the Krishna District to the Legislative Council. That decision is not a decision of a Court but of a special tribunal. We have not got a report of that decision and I am not bound by it. But I may observe that in the matter of the Election Offences Act bearing on elections to the Legislative Council there is no section corresponding to section 52 of the District Municipalities Act. If an allegation is made in the matter of an election to the Legislative Council that a candidate committed acts which would amount to an offence under section 52 of the District Municipalities Act, it would not be an offence under the Election Offences Act relating to the Legislative Council. The special tribunal who decided that case was therefore right in disallowing an entry into those allegations. The decision in *Vaidyanatha Thevar* v. *Murugaiyan Chettiar*[6] relates to the election of a President of a Union Board. There can be no question of an electoral roll and this case cannot help the petitioner. I am therefore of opinion that the first contention of Mr. Ramadoss fails.

The next point argued by the learned Advocate is that the facts proved do not amount to an offence within the meaning of sections 52 and 55 and no conviction could be sustained under these sections on the evidence before the Court. In my opinion the latter consideration is irrelevant. We are not concerned now with a criminal case, nor is there any conviction of the 1st respondent for any offence. I am not to be understood as conceding that the evidence on record will not be

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3. (1926) 51 M.L.J. 701.
4. (1926) 51 M.L.J. 738 (F.B.).
5. (1927) 54 M.L.J. 269.
6. (1928) M.W.N. 549.

Narayanaswami Chettiar v. Subbaratnam Aiyar.

sufficient to sustain such conviction. It may be enough or it may not be enough. It is not a matter with which I am concerned or the Subordinate Judge is concerned. The only question in this case is whether in the opinion of the Subordinate Judge an offence has been committed and whether there is evidence for the conclusion that an offence has been committed. In my opinion there is ample evidence in this case to sustain the findings of the Subordinate Judge. Sitting in revision I am not competent to weigh the evidence. It is enough for me to observe that there is evidence to go to a jury. The following facts, namely, (1) that the 61 voters were not in the prior list, (2) that the new list made on or about the 28th October stated that all these persons began their profession on the 1st of October, (3) that this list was not signed by the Bill Collector of the Municipality but by the 1st respondent and he took it to his fellow councillor of the ward who signed it without scrutinising its contents (*vide* the evidence of P.W. 2) and then only the Bill Collector signed it, (4) that all the 61 persons were omitted in the next list and thus they continued as voters only for a period of six months, the omission being before the election now in question, (5) that their profession tax was paid by some unknown person (it does not appear that notices were served on them; their signatures do not appear on the other side of the notices served which is the usual practice), and (6) that at the time when the profession tax is said to have been paid, most of them had already left the municipality, their addresses were not known and they were not residents therein, in my opinion support the conclusion of the Subordinate Judge.

In the result the petition is dismissed with costs of the 1st respondent who is the only person that appears before me.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Damodaran .. *Petitioner* (Accused).*

Damodaran, *In re.*

Criminal Procedure Code (V of 1898), S 347—Scope and effect—If deprives the accused of his rights under Chap XVIII.

Section 347 of the Criminal Procedure Code does not deprive the accused of any of the rights conferred upon him by Chap XVIII.

*Cr Rev Cases Nos 551 to 553 of 1929. 31st July, 1929
(Cr.R Ps Nos 501 to 503 of 1929)

Damodaran, *In re.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 4th Presidency Magistrate, Georgetown, Madras, in Calendar Cases Nos. 20776, 20777 and 20778 of 1928, respectively.

V. L. Ethiraj and *N. Somasundaram* for petitioner.

V. Rajagopalachariar for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—These are three applications presented by the 1st accused to revise the orders of the 4th Presidency Magistrate, Georgetown, passed in the following circumstances. Complaints were laid against the petitioner in each of three cases under sections 406 and 420, I.P.C. The predecessor of the present learned Magistrate heard the prosecution evidence and was then transferred. The present Magistrate on taking up the case formed the conclusion that it was one which should be tried by a Court of Session inasmuch as it involved the offences also of forgery and using as genuine a forged document, rendered punishable by sections 467 and 471, I.P.C., respectively. That being so, the question arose as to the procedure to be thereupon adopted. Applications were made by the petitioner for a *de novo* trial and in the orders against which these revision petitions are preferred the learned Presidency Magistrate has declined to grant them for certain reasons which he gives.

The petitions raise a question as to the construction of section 347, Criminal Procedure Code, which empowers a Magistrate, at any stage of an inquiry or trial before its completion to "commit the case under the provisions hereinbefore contained" It is scarcely disputable that the phrase "under the provisions hereinbefore contained" must relate to those provisions in Chapter XVIII of the Code which define the procedure to be adopted in the inquiries into cases triable by the Court of Session. Nor can it be disputed that in all ordinary circumstances the procedure which a Presidency Magistrate follows in the trial of a criminal case is not identical with that laid down by Chapter XVIII for the conduct of a preliminary inquiry. To begin with, the question would arise whether the method of recording evidence required by section 362 (1) in a case tried by a Presidency Magistrate in which an appeal lies was adopted or whether, availing himself of the provisions of sub-section (4) of that section, the Magistrate deemed himself absolved from taking down the evidence at length. Mr. Ethiraj

Damodaran, *In re.*

for the petitioner is, however, prepared to concede here that the evidence may have been taken down *verbatim* under the prior provision, so that he does not press this possible point of difference. There can be no question however that, after the evidence was so recorded, the provisions of section 360 were not complied with, namely, it was not read over to each witness in the presence of the accused as required by that section, read with sections 207 and 208 of Chapter XVIII.

The general question of the construction to be placed on section 347, Criminal Procedure Code, received reconsideration in a Full Bench case of the Lower Burma Chief Court composed of five Judges. The case came up to that Court after commitment and not, as here, before a committal order had been made. Nevertheless, it was held by four of the learned Judges that a commitment made otherwise than under the provisions of section 347 as I have construed them above, that is to say, as requiring compliance with the terms of Chap. XVIII, Criminal Procedure Code, was illegal and should be quashed. As observed by the learned Chief Judge,

> "Perhaps the strongest reason for holding that section 347 in no way overrides and in no way dispenses with the obligation of following Chapter XVIII is that in that Chapter the Legislature has laid down provisions for procedure before commitment some of which were obviously intended and rightly intended for the benefit of accused persons"

I may add that in the present cases the omission to read over the depositions to the witnesses is not a mere formal omission but may deprive the accused of the valuable right to contradict the witnesses during the Sessions trial by reference to their prior statement. This Burma decision was quoted with approval in the judgment of a Bench of this Court (*In re Chinnavan alias Nallanayakan*[1]) upon a revision petition praying to quash the committal order in a case where a Stationary Sub-Magistrate had originally proceeded on a charge under section 354, Indian Penal Code, of indecent assault, subsequently and before delivering judgment coming to the conclusion that the case should be committed to the Sessions under sections 376 and 511. The learned Judges say:

> "We agree entirely with the decision of the Full Bench of the Burma Chief Court that it was not intended by section 347 to enable the Magistrate to deprive the accused of any of the rights conferred on him by Chapter XVIII."

and although in the case before them the committal order had already been passed and, finding no prejudice caused to the

1. (1914) 23 I C 734

Damodaran, *In re.*

accused, they refused to quash it, it appears to me that, irrespective of my own view that this construction is clearly right, I should follow this authority in the absence of any to the contrary.

The learned Crown Prosecutor has urged that here also, as in *In re Chinnavan* alias *Nallanayakan*,[1] the petitioner must allege prejudice in order that the orders of the learned Presidency Magistrate must be set aside. I do not agree that, when these cases have not reached the stage of committal and nothing in the main proceedings has to be undone before the procedure which is prescribed by law can be followed, any question of the prejudice occasioned to the accused arises. He certainly has a right to claim that the provisions relating to inquiries before commitment shall be observed irrespective of any such consideration. My conclusion accordingly is that the orders under revision are unsustainable in law and I set them aside and direct the Lower Court to re-open the inquiry *de novo* in the light of the observations made above and proceed with it.

N.S. *Petition allowed and fresh enquiry directed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD DARLING, LORD TOMLIN, SIR JOHN WALLIS AND SIR GEORGE LOWNDES.

Albert Bonnan .. *Appellant** (*Plff.*)

v.

The Imperial Tobacco Company of India, Limited .. *Respondents* (*Defts.*).

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Albert Bonnan *v.* The Imperial Tobacco Company of India Limited.

Malicious prosecution—Civil proceedings—Institution of—Suit for damages for—Maintainability—Conditions—Malice and want of reasonable and probable cause—Proof of—Onus on plaintiff—Legal advice ultimately turning out to be wrong—Suit instituted in reliance upon—If can be held to be instituted without reasonable and probable cause—Evidence of legal advice—Cables received from England—Rejection of one of—Propriety

Malice and want of reasonable and probable cause is of the essence of a suit for damages for the malicious institution of civil proceedings

Quaere as to what other conditions may be necessary to enable a plaintiff to succeed in such a suit, and as to the principles to be deduced from the judgments in *The Quarts Hill Consolidated Gold Mining Co* v. *Eyre*, (1883) 11 Q.B.D 674

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*P.C. Appeal No. 76 of 1928. 13th June, 1929

1. (1914) 23 I.C. 734

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Proceedings instituted in reliance upon expert legal advice received from England cannot be held to be instituted without reasonable and probable cause merely because that advice in the event proved to be wrong.

On the plaintiff's counsel, in such a suit, raising a question as to the advice upon which the defendant had acted in instituting the proceedings, the defendant tendered in evidence two cables received from a solicitor in England in reliance upon which he acted The Trial Judge admitted the first cable in evidence but rejected the second, apparently on the ground that it had been not duly disclosed

Held, agreeing with the Appellate Court, that on the question of reasonable and probable cause the second cable was clearly relevant and indeed of much weight

Appeal No. 76 of 1928 from a decree, dated the 21st January, 1927, of the High Court, Calcutta, in its Appellate Civil Jurisdiction (Rankin, C.J. and C.C. Ghose, J.), reversing a decree of Mr. Justice Pearson, dated the 25th January, 1926, whereby he directed an inquiry as to the damages sustained by the appellant by reason of various acts of the respondents complained of in the suit.

The material facts of the case appear fully from the exhaustive judgments of the Trial Judge and the Court of Appeal, reported in 46 C.L.J. 455. The proceedings at an earlier stage are reported in (1924) A.C 755: I.L.R. 51 C. 892: 47 M.L.J. 69 (P.C.) and I.L.R. 50 C. 762.

The present appeal to His Majesty in Council arose out of a suit by the appellant against the respondent company for damages caused by the respondent company in maliciously prosecuting a suit against the appellant.

The main question for determination was, whether the appellant's suit for malicious prosecution was, in the circumstances of the case, maintainable.

The Court of first instance (Pearson, J.) held in the affirmative; but the decision was reversed on appeal.

The learned Chief Justice, in the Court of Appeal, held that the two suits brought by the respondent company against the appellant could not support the appellant's suit for malicious prosecution, even if the former suits were maliciously commenced and prosecuted. He quoted the following passage from the judgment of Bowen, L.J., in *The Quartz Hill Consolidated Gold Mining Company* v. *Eyre's case*[1] in support of his conclusion:

"... The broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

1. (1883) 11 Q.B.D. 674 at 690.

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The learned Chief Justice also held that the two suits brought by the respondent company against the appellant were not malicious but that there was reasonable or probable cause for them.

In the result the learned Chief Justice held that the appellant's suit failed, but he treated it as an application in the former suit, No. 1610 of 1922, for an enquiry as to the damage caused by the interim injunction made in that suit on the 11th May, 1922, and referred it to the Official Referee to ascertain the amount of such damage.

Mr. Justice C. C. Ghose in his judgment concurred with the learned Chief Justice.

Herbert du Parcq, K.C. and *S. Hyam* for appellant.

Sir D. M. Kerly, K.C., F. E. Bray and *J. H. Pickup* for respondents.

13th June, 1929. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The suit out of which this appeal arises is the offshoot of a case which came before this Board and was decided adversely to the present respondents (the then appellants) in May, 1924. The facts leading up to the litigation are fully set out in the report, *Imperial Tobacco Company of India, Ltd.* v. *Bonnan*[1]; for the purposes of the present appeal they may be summarised as follows:—

The respondents, a limited company incorporated in India, but to a certain extent apparently subordinate to the British-American Tobacco Company, Ltd., in this country, who hold some 80 per cent. of the Indian Company's shares, had been importing and selling Wills' Gold Flake cigarettes upon monopoly terms in India since 1910, and had no doubt built up an exceedingly valuable trade. In 1921 the appellant (Bonnan) purchased some millions of genuine Wills' Gold Flake cigarettes from the British Army canteen authorities at a price which would enable him to undersell the respondents in the Indian market. He shipped a considerable quantity of these to India and offered them for sale in Bombay and Calcutta. He succeeded in disposing of his earlier consignments upon favourable terms, but subsequent arrivals were detained by the Indian Customs authorities at the instance of the respondents, who alleged that they were counterfeit. On the 11th May, 1922,

1. (1924) A.C. 755. I.L R. 51 C. 892: 47 M.L.J. 69 (P.C.).

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after reference to the British-American Tobacco Company in London, the respondents instituted a suit in the Calcutta High Court against the appellant, claiming to be entitled to restrain him from selling his cigarettes there, and on the 22nd of May a similar suit was instituted in Bombay. In both suits applications were made by the respondents for an interim injunction. The injunction was granted in the Calcutta suit on the 11th May, 1922; in the Bombay suit the appellant gave a formal undertaking to the Court not to sell In both cases the respondents also gave what has been described as "the usual undertaking in damages," which their Lordships understand to mean an undertaking to make good to the appellant in each of those suits any damages which the Court might hold to have been reasonably consequential on the action taken by the respondent if ultimately held to have been unjustified.

The Calcutta suit was prosecuted by the respondents up to this Board, and was finally disposed of in May, 1924, as above stated, it being held by their Lordships, in affirmance of the decrees of both Courts in India, that the appellant's cigarettes were genuine articles, lawfully acquired from the lawful manufacturers, and that as such the appellant (Bonnan) had a right to sell them in India.

The Bombay suit, which had been stayed pending the final decision of the Calcutta suit, was dismissed by consent in November, 1924.

No proceedings were taken by the appellant either in Calcutta or Bombay to enforce the undertaking in damages given by the respondents, but on the 21st January, 1925, he instituted in the Calcutta High Court the suit out of which the present appeal arises, claiming from the respondents damages (amounting in all to over seven lakhs of rupees) on the allegation that the former proceedings were taken maliciously without reasonable or probable cause. The Trial Judge (Pearson, J.) held that this had been established by the appellant; the Court of Appeal held that it had not, and the main argument before their Lordships has turned on this difference of opinion, it being now admitted by the appellant that if the view taken by the Appeal Court is right, his suit, as a substantive claim for damages, must necessarily fail. It had been contended in India that proof of malice and want of reasonable and probable cause was not of the essence of such a suit as that brought by the appellant, but this contention was not pressed before their Lordships.

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When the first consignment of the appellant's cigarettes arrived in Calcutta in March, 1922, the respondents seem to have consulted their local solicitors, who were evidently not prepared to advise legal proceedings. Mr. Abbott, the Chairman of the respondent company, wrote to the British-American Tobacco Company in London, apprising them of the arrival of the competing goods, and giving them the name of the shipper (Bonnan) and details of the mark upon the packages. In answer to this letter the respondents received a cable, dated the 4th April, from a Mr. Macnaghten, to the effect that the sale of these cigarettes would be an infringement of the respondents' mark, and suggesting certain steps that might be taken to prevent it. This was followed on the 10th April by a second and more explicit cable from Mr. Macnaghten, expressing disagreement with the Calcutta solicitor's advice, reiterating the opinion that the sale would be an infringement of the respondents' mark, and adding that he had taken the opinion of a well-known counsel in England, who concurred. It appears that Mr. Macnaghten was a Director of, and the standing Solicitor to, the British-American Tobacco Company, and he is referred to by Mr. Abbott in his evidence as "our legal adviser in London."

At the trial before Mr. Justice Pearson the first cable of the 4th April was put in evidence by the appellant, but that of the 10th, though tendered at the hearing and referred to in the evidence, was rejected, apparently on the ground that it had not been duly disclosed, and the learned Judge, excluding this obviously important document entirely from his consideration, held that the respondents had no reasonable or probable cause for the institution of their suits and that malice had been established. In the Court of Appeal the cable of the 10th April appears to have been treated as being before the Court. Both the Chief Justice and Mr. Justice Ghose, before whom the appeal came, express themselves as unable to understand why it should have been excluded, and founding upon it as expressing the considered opinion of the respondents' competent legal advisers in London, they held that the respondents were entitled to act upon it.

Their Lordships are in general agreement upon this point with the learned Judges of the Court of Appeal They think that on this question of reasonable and probable cause Mr. Macnaghten's second cable was clearly relevant and indeed of much weight. It may be that the respondents' legal advisers did not in the first instance realise its importance, and that its

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non-disclosure was wrong. But when once a question was raised (as it was by the appellant's counsel) as to the advice upon which the respondents had acted, and the first cable of the 4th April was put in evidence, the second cable of the 10th was clearly admissible. Reading the evidence of Mr. Abbott and of Mr. Ryan, the solicitor-secretary of the respondent company, though their depositions may not be wholly satisfactory on other questions, their Lordships have no doubt that it was in reliance upon the expert advice so received from London that the proceedings were instituted, and that though, as the event proved, that advice was wrong, it would be impossible rightly to hold that the respondents in acting upon it had no reasonable or probable cause for the course they took.

Their Lordships having come to this conclusion, it is not material for them to consider what other conditions may be necessary to enable a plaintiff to succeed in a suit of this nature. There was much discussion in India, and some also before this Board, as to the principles to be deduced from the judgments in *The Quartz Hill Consolidated Gold Mining Company* v. *Eyre.*[1] Their Lordships, however, make no pronouncement upon this aspect of the case, which may require further consideration on some future occasion.

With regard to the action of the Customs authorities, for which the respondents may well have been legally responsible, and by which it is at least probable that the appellant was damnified, it is only necessary to state that it has been held by both Courts in India that any claim under this head is barred by the provisions of the Indian Limitation Act, and this finding has not been contested here. Nor has the appellant questioned before their Lordships the Appellate Court's finding that no case of slander of goods has been made out against the respondents, though on this part of the case the learned Judges appear to have dissented from the view of the Trial Judge.

It only remains to consider a question which arose in connection with certain qualified relief allowed to the appellant by the Indian Courts. Though it was held against him that his suit for damages could not as such be maintained, the learned Judges were prepared to treat the claim made by him as an application in the former suit (instituted by the respondents in Calcutta) for an inquiry as to damages arising from the grant of the injunction of the 11th May, 1922, as to which the respondents had given the undertaking already referred to, and a formal

1. (1883) 11 Q.B.D. 674.

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reference for this purpose was embodied in the decree of the Appeal Court. Neither the competence nor the propriety of this reference has been questioned by the respondents, but the appellant objects to the exclusion by the Appeal Court from the consideration of the Referee of one particular head of damage under which a large claim was made in the plaint.

It appears that at the date of the injunction the appellant had outstanding in the hands of his vendors a large quantity of cigarettes, no doubt intended for the Indian market, but on which only a deposit had been paid. On the 17th May, 1922, he wrote to his vendors, asking them to cancel the goods, as owing to the injunction he would be unable to dispose of them in India. This was confirmed by another letter of the appellant, dated the 6th June, 1922, despatched only two days before the injunction was dissolved, and at a time when he knew (as the terms of the letter show) that his vendors were still prepared to keep the contract open. Under these circumstances the Appeal Court were of opinion that the cancellation was not due to the granting of the injunction, but was a voluntary act on the part of the appellant for which the respondents were not liable.

In this conclusion their Lordships concur. It is obvious that the appellant was not prepared to wait, even a short time, before giving final instructions for the cancellation, to see whether the injunction was to be continued as to future importations, nor did he care, on its discharge, to cancel his letter of the 6th June, as he could easily have done by cable. There may have been business reasons, quite apart from the injunction, making it prudent to cancel, such as the imminent approach of the monsoon, by which further importations might have suffered, or difficulties of finance.

Their Lordships also agree with the Court of Appeal that this question having been considered and decided against the appellant, ought not to be reopened before the Referee.

For the reasons above stated, their Lordships are of opinion that this appeal fails, and they will humbly advise His Majesty that it should be dismissed. The appellant must pay the costs.

Solicitors for appellant: *Sanderson Lee & Co.*

Solicitor for respondents: *Fred. F. Macnaghten.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—VISCOUNT DUNEDIN, LORD SHAW, LORD BLANESBURGH AND SIR JOHN WALLIS.

Maharajadhiraj Sir Rameshwar Singh and another .. *Appellants** (*Defts.*)

v.

Bajit Lal Pathak and others .. *Respondents* (*Plffs.*).

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Maharaja-dhiraj Sir Rameshwar Singh *v.* Bajit Lal Pathak.

Evidence Act (I of 1872), S 114, Ill (g)—Party—Non-production of available material evidence—Presumption from—Onus of proof on opponent —Non-production relying upon fact of—Zemindar having access to material records—Defences inconsistent put forward by—Responsibility for—Criminal Procedure Code, S 145—Summons in proceeding under—Schedule to—Boundaries of property given in—Neither party responsible for.

In a suit brought against a Zemindar for the recovery of possession of some bighas of agricultural land lying within the ambit of a mauza in the defendant's zemindari, the defendant put forward inconsistent defences and withheld the best evidence in his possession which would have clearly helped the Court in deciding the case one way or another. In the change of attitude on the part of the defence and in its failure to produce documents presumably available and probably decisive one way or another if examined, the Judges of the High Court saw a design on the part of the defendant to take advantage of the abstract doctrine of burden of proof upon a plaintiff in ejectment

Held, that the defendant, who had access to the papers, maps, and surveys of a well-ordered zemindari, could not disclaim responsibility for the inconsistency in the defences put forward by him.

Held further, agreeing with the High Court, that the excuses made by the defendant for the non-production of the documents in his possession were unsatisfactory and unreliable, and that their non-production was due to the fear that, if produced, they would either establish the plaintiff's claim or would lead to a successful claim, albeit in another suit, which would be more serious for the defendant than that made in the suit out of which the appeal arose

Observations of Lord Shaw in *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambandha Pandara Sannadhi,* (1917) L.R. 44 I.A. 98. I.L.R. 40 Mad 402 (408): 32 M.L.J. 369 (P C) on the subject referred to and applied.

The boundaries of property given in the schedule to the summons in a proceeding under S. 145 of Criminal Procedure Code are presumably those given to the Magistrate by a Police Officer apprehending a breach of the peace and neither party is responsible for the statement of the boundaries therein

Appeal No. 7 of 1927 from a judgment and decree, dated the 4th January, 1926, of the High Court, Patna (Jwala Prasad and Bucknill, JJ.), reversing a judgment and decree, dated the 20th February, 1922, of the Subordinate Judge of Purnea.

The main question for determination on the present appeal was whether the lands in dispute in Mauza Bela Pemo (44

*P.C. Appeal No. 7 of 1927. 22nd January, 1929.

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bighas, 8 cottahs) were the jote lands of the plaintiff-respondent, Bajit Lal Pathak. The Subordinate Judge found against him, but the High Court found in his favour.

Dunne, K.C. and *K. Brown* for appellants.

Wallach for respondents.

Dunne, K.C., argued that the High Court had, in effect, placed the onus of proof upon the appellants (defendants). It is undoubted law that in an action of ejectment the burden is upon the plaintiff.

22nd January, 1929. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The question at issue in this suit is as to the ownership of some 44 bighas, 8 kathas of agricultural land lying within the ambit of the mauza of Bela Pemo in the zemindari of the Maharaja of Darbangha. The lands constitute the bulk of a single well-defined block of three jotes having a total area described throughout the proceedings as of 59 bighas and 8 kathas. The remaining 15 bighas, 4 kathas occupy a central position in the block, being surrounded by the 44 bighas. The whole area has been claimed by Bajit Lal Pathak, the first respondent. But it is his claim to the 44 bighas which is alone in question in this suit. His claim to the 15 bighas has been dealt with in a separate suit to which, with its result, reference will later on be made.

The history of the lands is voluminous; but as it has been detailed with much care and precision in the judgments below, it need not be again elaborated here.

The plaintiff's case—and by the term "plaintiff" their Lordships when they use it will refer to the first respondent, who in all proceedings has been the real contestant on one side, just as when they use the term "defendant" they will refer to the first appellant, the Maharaja of Darbangha, who has in all proceedings been the real contestant on the other side; the plaintiff's case has been that the lands formed three hereditary jotes held by his ancestors with occupancy rights and enjoyed by himself and his tenants until the time when, shortly before this action was brought, he was displaced from possession.

In this suit, in which the plaintiff seeks to recover the lands of which he was so dispossessed, many issues were raised by the defendant. Some of these must be referred to, not because they remain active, but because the fact that the defendant raised them and failed, may have a bearing on the question which still

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remains for decision. That is the single question whether the 44 bighas claimed by the plaintiff or any of them form part of his three jotes. It is a mere question of identity of parcels. The doubt upon it—one raised by the defendant very late in the day—is occasioned by some kind of change which 30 or more years ago took place in the course of the River Kosi, flowing through or near the village. What then actually happened has been differently described by the defendant at different stages of the dispute, and to this specific matter their Lordships must for a special reason return later. It suffices to say now that for a period of 12 or more years, between 1895 and 1907 and as a result of the visitation, whatever was its nature, much of the land of the village fell out of cultivation, and, when ultimately deliverance came and the lands were in process of restoration to husbandry, it was found that the plaintiff on the one hand and the defendant on the other were ranged as rival claimants for the whole block.

There was at this time, and for long after, no question as to the particular lands claimed by each side. Both parties had got kabuliats from their own respective tenants with whom the lands had already been settled, and the terms of these kabuliats sufficiently show that the contestants, if they were agreed on nothing else, were at one as to the identity of the land they were each claiming: the defendant asserting his right thereto as Parti of the Raj, which he might settle with whom he pleased; the plaintiff's claim being that already stated. Nor was this question of identity raised when the contest as to these lands first became acute. This was in 1916 The plaintiff had erected on the lands a *kamatghar*. A body of men acting, as it was alleged, at the instigation of the Raj, broke in and almost demolished it. Only the thatch was left hanging on two poles, and the other materials were scattered and destroyed. In the criminal proceedings under section 145 of the Criminal Procedure Code which ensued, the question who was in *de facto* possession of the lands on which the *kamatghar* was placed had to be determined, and in view of the case which the defendant has set up in these proceedings and of the issue which alone survives, it is relevant to see what were the allegations of fact upon which his defence was then rested These were that the mauza was inhabited and cultivated up to 1895. About that time, owing to a change in the course of the river, there was deposit of sand and growth of jungle in the village, which consequently became unfit for cultivation. The tenants left the place and settled elsewhere. The plain-

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tiff also left and made no arrangement for payment of rent. As the whole mauza practically was deserted, the defendant was entitled to treat the lands as abandoned, and he did. After some years the condition of the village improved and the Raj got the lands surveyed. This took place in 1909-1911. The plaintiff having abandoned his lands, these survey papers contain no mention of them as being in his family. The plaintiff's efforts to get back his old lands, by depositing the rent thereof in Court, by taking kabuliats after settlement, were all subsequent. Such was the case of the defendant as appears from the judgments in the criminal proceedings. It was no part of that case, it will be seen, that the jotes of the plaintiff were not well known and recognised. The contention was that they had been abandoned. Nor was any doubt thrown on the identity of these jotes with the lands then claimed by the plaintiff. No case, indeed, other than one of abandonment was made, and the abandonment was said to have been occasioned by a deposit of sand and growth of jungle resulting from a change in the course of the river. There is no reference to any flood.

The details of these criminal proceedings, and of further proceedings of a like kind with reference to the lands, are fully described in the judgments below. They resulted in a final order of July 21, 1920, whereby the plaintiff was left in *de facto* possession of the 15 bighas, and the defendant in possession of the 44 bighas. This led to the institution of two suits. The first is the present suit, in which the plaintiff claims possession of the 44 bighas in regard to which the Criminal Court had found against him; the second was that already referred to, in which it was claimed that the Maharaja of Darbangha and his lessees were entitled to possession of the 15 bighas. In this second suit the Maharaja has failed. The Munsif decided against him on the 31st March, 1924, and his decision was affirmed on appeal by the District Judge of Purnea and by the High Court on second appeal on the 4th January, 1926. The result is that it has been finally decided that the 15 bighas appertain to and are included in the ancestral jotes of the plaintiff, and this land, as has already been stated, is in the centre of the block, the remaining 44 bighas of which are the subject-matter of the present suit. That suit was dismissed by the Subordinate Judge of Purnea by a decree of the 20th February, 1922, but on appeal the suit was decreed by the High Court of Judicature at Patna on the 4th of January, 1926. It is from that decree that the Maharaja and his tenant now appeal to the Board.

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The answer to the plaintiff's claim in the suit, made by the written statement of the defendant, was in striking conflict with the defences relied upon in the criminal proceedings. The plaintiff, it is there alleged, had no jote land at all in mauza Bela Pemo with right of occupancy either ancestral or self-acquired; his predecessor-in-interest had no jote land in Bela Pemo which was heritable. The lands in suit never formed part or parcel of any jote land of the plaintiff, and the land claimed was Raj Parti land belonging to the defendant. Almost the entire mauza Bela Pemo having been inundated by the River Kosi, became, it was alleged, absolutely unfit for cultivation in the year 1895, and it remained in that condition till the year 1907, when the lands of the mauza began gradually to be reclaimed. It was then that the plaintiff, who is a shrewd and designing man, began to make documents in respect of the lands. Such was the defence to this suit. As will be observed, the allegation prominently made that the lands in suit formed no part of any jote land of the plaintiff is coupled with the allegation, equally emphatic, that the plaintiff had no jote land at all in the village, and that his predecessor had none which was heritable. And the further allegation is that it was owing to an inundation by the river that, for a period extending over 12 years, the village lands were lost. A defendant with access to the papers, maps and surveys of a well-ordered zemindari cannot disclaim responsibility for these new and inconsistent statements. And they fared badly.

The new allegation that the plaintiff had no jote lands in the mauza, either ancestral or self-acquired, was soon abandoned. Before the Subordinate Judge the defendant's vakil was constrained to admit the existence in the mauza of three jotes in respect of which the plaintiff paid rent from time to time, and in the High Court the learned Judges, after a careful examination of the receipts and documents produced, declared their conclusion to be that the finding of the Subordinate Judge that the plaintiff's ancestors and thereafter the plaintiff held the jotes in the village, aggregating 59 bighas, 14 kathas, as claimed by them, was not based only upon the admission made on behalf of the defendant in the Court below, but rested upon the overwhelming documents in the case. And this finding was in no way canvassed before their Lordships.

No question accordingly now remains except one of identity of parcels. Has the plaintiff proved that these 44 bighas definitely and specifically claimed by him during so many years are

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indeed part of the three jotes of 59 bighas the existence and his ownership of which have now been proved? That the 59 bighas formed one block is not disputed; that the 15 bighas in the centre of the block in suit formed part of the plaintiff's jotes has been finally established. In these circumstances very little further evidence to show the identity of the residuary 44 bighas is required. And in the opinion of the High Court that evidence is forthcoming in the testimony of the plaintiff himself and one of his witnesses who definitely depose to the fact, the evidence of witnesses on behalf of the defendant being silent as to the condition of the lands and their ownership before the visitation to which reference has so often been made.

In these circumstances the real question for their Lordships to determine is whether the High Court was entitled, differing in this from the Subordinate Judge, to reach its conclusion of fact. On this it is contended that the plaintiff's evidence should be entirely rejected because of the assertion which he certainly did make that there had to his knowledge been no inundation in mauza Bela Pemo as was sworn to by the defendant's witnesses and accepted by both Courts. But is it so certain that the visitation which undoubtedly continued over a long period of years took the form of an inundation? It was not apparently noticed in either Court below that there was no reference to any such inundation by the defendant's witnesses in the criminal proceedings; the visitation as there described took, as has already been stated, the form of a deposit of sand and growth of jungle. Their Lordships, indeed, on the whole evidence are left in doubt whether in truth there was ever any inundation at all. They certainly cannot take the responsibility of discrediting the plaintiff for making a statement which, so far as it goes, is in accord with the defendant's own case only a few years before.

The divergent finding of the Subordinate Judge on this question of identity is mainly based on a hypothesis which is shown by the High Court to have been mistaken. The learned Judge largely rested his finding against the plaintiff on the terms of a schedule to a summons in one of the criminal proceedings (Exhibit 9), in which in 1917 the 15 bighas are described as being bounded on the south, east and west by the property of the Raj, instead of being described as bounded by the property of the plaintiff or his tenants, as they should have been if his case as to the 44 bighas is correct. The learned Judge attributes this statement of boundaries to the plaintiff or his agent and describes it as knocking at the head of his case. But, as was pointed out

in the High Court, the boundaries given in the schedule to the summons are presumably those given to the Magistrate by a Police Officer apprehending a breach of the peace and for his views on such a subject neither party is responsible. The stated boundaries upon which in the ensuing proceedings, as the learned Judges point out, the Magistrate acted, were the boundaries shown by a kabuliat put in by the plaintiff, in which the boundaries given in no way indicate that the 44 bighas were then regarded as the property of the Raj.

But the finding of the High Court on this point was further confirmed by the view the learned Judges there took of the attitude of the defendant in this matter. They were deeply impressed by the fact that his case had been altered; they were even more impressed by the fact that the best evidence in his possession which would have clearly helped the Court in identifying the land in dispute had been withheld. Neither village papers nor measurement khasras were produced, and the learned Judges say that when called for before them the defendant took time to produce them and failed to do so. In the change of attitude on the part of the defence and in its failure to produce documents presumably available and probably decisive one way or another if examined, the learned Judges saw a design on the part of the defendant to take advantage of the abstract doctrine of the burden of proof upon a plaintiff in ejectment.

Their Lordships, in agreement with the High Court, consider that the excuses made by the defendant for the non-production of these documents are unsatisfactory and unreliable, and, like the learned Judges of the High Court, they consider that their non-production is due to the fear that, if produced, they would either establish the plaintiff's claim, or, in view of the defendant's admission as to the existence somewhere within the village of three jotes of the plaintiff of the area assigned would lead to a successful claim, albeit in another suit, which would be more serious for the defendant than that made in this suit. Their Lordships would refer to the views of the Board on this subject expressed by Lord Shaw when delivering the judgment of the Board in the case of *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambandha Pandara Sannadhi*[1] and would again endorse them. In their Lordships' judgment the learned Judges of the High Court were well warranted in finding further confirmation of the plaintiff's evidence in the defendant's reticence and inconsistency. On the whole case they can find no ground for

1. (1917) L R. 44 I.A 98 I L.R. 40 M. 402 at 408 32 M.L.J. 369 (P C).

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interfering with the decree of the High Court. In their judgment that decree ought to be affirmed and this appeal therefrom be dismissed with costs.

And they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Pugh & Co.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR LANCELOT SANDERSON.

Kunwar Mulayam Singh and another .. *Appellants**

v.

Sheoraj Singh and others .. *Respondents.*

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*Evidence—Pedigree—Proof of—Evidence—*Pandas *and* Jagas*—Books of, containing entries relating to pedigree—Admissibility of—Value of*

The question in the appeal was whether the pedigree set up by the appellants or that set up by the respondents was the true one Certain books of *pandas* and *jagas* containing entries relating to pedigree were produced and relied upon by the respondents The Subordinate Judge treated the entries in those books as forgeries, accepted the pedigree of the appellants, and gave judgment in their favour The High Court, on the other hand, came to the conclusion that the entries in those books were genuine and conclusively established the respondents' case

The evidence in the case fell under two categories, (1) the oral, and (2) the documentary. But if the documentary evidence was genuine and admissible, it was of such a character as to support strongly the respondents' case and to afford firm ground from which to test the oral evidence.

Held, the books of *pandas* and *jagas* referred to above were certainly admissible in evidence, but that, having regard to their nature, it was proper that they should be received with extreme caution and with a measure of suspicion

Held further, affirming the High Court, that the entries in the books of the *pandas* and the *jagas* were undoubtedly genuine and established the respondents' case.

Appeal No. 94 of 1927 from two decrees of the High Court of Judicature at Allahabad.

Dunne, K.C. and *Wallach* for appellants.

De Gruyther, K.C. and *Dube* for respondents.

6th June, 1929. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is a consolidated appeal from two decrees of the High Court of Judicature at Allahabad, dated the

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*P.C. Appeal No 94 of 1927 • 6th June, 1929.

23rd December, 1924. By these decrees two decrees of the Subordinate Judge of Aligarh, dated the 27th May, 1921, were reversed, with the result (1) that a suit by the appellants for recovery of possession of the major portion of the Kora Rustampur estate then in the hands of the respondents was dismissed, and (2) that in a suit by the respondents for recovery of possession of the remainder of the same estate then in the hands of the appellants, judgment for recovery of possession was decreed.

The question raised by the appeal is exclusively one of fact, and shortly stated, is whether the pedigree set up by the appellants or that set up by the respondents is the true one.

The appellants on the one hand claim the Kora Rustampur estate upon the ground that they are the cognates or *bandhus* of the deceased owner. They can only succeed as *bandhus* in the absence of agnates or sapindas. The pedigree set up by them purports to show that there were no sapindas. The respondents on the other hand claim that they are, or trace title under, sapindas and set up a pedigree purporting to establish this position.

The history of the matter so far as there is no dispute of fact may be stated as follows:—

One Sukram Singh, a Hindu, was the owner of the estate in 1889. He had inherited the estate from his father, Pirthi Singh, who died about 1857. Pirthi Singh had received the estate as a gift from his maternal grandfather, Dungar Singh.

On the 30th September, 1889, Sukram, who had no children and was seriously ill, executed an authority in writing which was duly registered authorising his wife, Lachmi Kunwar, to adopt anyone from among relations, brotherhood or family.

Among the witnesses to this instrument was Moti Ram, a Brahman attached to the household of Sukram.

On the 2nd October, 1889, Sukram died.

On the 5th November, 1890, Lachmi Kunwar, in order to satisfy debts of her deceased husband, executed a sale-deed of part of the estate in favour of Phul Singh and Karan Singh, residents of Mauza Karauli, which was part of the estate.

The sale-deed contained a recital to the effect that to the best of the knowledge and belief of Lachmi Kunwar, there was no male member of the family of her husband who might be considered as future heir to her husband's estate after her death and that she had not adopted any boy as successor to her husband and that the entire estate was free from all bars to transfer it.

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On the 29th July, 1895, Lachmi Kunwar adopted as her son one Bejai Pal, an infant grandson of her brother. On the same day she executed a deed of guardianship by which she appointed three persons, including Moti Ram and one Lekraj Singh, to be guardians of the infant. The deed of guardianship stated that there was no near or remote relative in the family of Sukram Singh who might be expected to look after the minor after the death of Lachmi Kunwar.

On the 3rd August, 1895, Lachmi Kunwar died and thereupon Bejai Pal became entitled to the estate which fell to be managed by the guardians appointed by the deed of guardianship.

It appears, however, that Jai Singh, the son of a sister of Sukram, succeeded in getting possession of the estate or the major part of it.

Moti Ram and the other guardians shortly after Lachmi Kunwar's death made application to the Revenue Court for mutation of names by substituting the name of Bejai Pal for that of Lachmi Kunwar.

This application was opposed by Jai Singh on the ground that the adoption was not proved or was invalid and that he, as the son of a sister of Sukram, was entitled as *bandhu* to the estate and that he was in possession.

The application was also opposed by certain Mukhraulias descended from Dungar Singh, Pirthi Singh's maternal grandfather. These opponents alleged that Pirthi Singh had been adopted by Dungar Singh and that they were accordingly sapindas of Sukram Pirthi's son.

In the result, on the 6th March, 1896, the Revenue Court ordered Jai Singh's name to be entered on the Register because he was proved to be in possession, neither of the other parties having satisfactorily proved their case. There is some ground for thinking that this result was due in part at any rate to the fact that Lekraj Singh and Moti Ram, two of Bejai Pal's guardians, betrayed or were lukewarm in support of his interest as the result of pressure brought to bear on them by some persons connected with the household of the Rajah of Jaipur.

It is to be observed that at this time no claim was put forward by those through whom the respondents claim, although in point of title their claim, if well founded, would have been superior to that of Jai Singh.

In 1901 Bejai Pal began in the Court of the Subordinate Judge of Aligarh a suit (No. 107 of 1901) against Jai Singh and purchasers from him to recover possession of the estate.

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About the same time and in the same Court the present appellants, who are first cousins of Jai Singh, being sons of another sister of Sukram, began a suit (No. 114 of 1901) against Jai Singh, the persons claiming under Dungar and against Bejai Pal disputing the validity of the adoption of Bejai Pal and asserting their claim to the estate as *bandhus* of Sukram.

On the 8th April, 1902, judgment in favour of Bejai Pal was given in suit No. 107 of 1901, the adoption of Bejai Pal being held proved and valid.

On the 6th May, 1902, the appellants' suit No. 114 of 1901 was dismissed, the Judge holding that the adoption of Bejai Pal was proved and valid.

On the 23rd December, 1904, the decrees in both suits were affirmed by the High Court of Allahabad.[1]

Jai Singh appealed to His Majesty in Council but abandoned the appeal on the death of Bejai Pal, which occurred on the 27th January, 1908.

Up to this point in the history of the case no one had set up the claim now put forward by the respondents.

Shortly after Bejai Pal's death one Lilawati, claiming to be the widow of Bejai Pal, began mutation proceedings against the appellants and Jai Singh to secure the entry of her name on the Register as owner of the estate.

Objection was taken not only by the appellants and Jai Singh claiming as *bandhu*, but also (1) by the Mukhraulias claiming under Dungar; (2) by the respondent Chote Singh and his brother Nain Singh, since deceased, whose sons are respondents to this appeal; and (3) by Desraj Singh, since deceased, whose sons are also respondents to this appeal.

This is the first occasion on which, apart from the Mukhraulias claim, any claim had been put forward based on the existence of sapindas of Sukram. It is to be noted, however, that in the first instance the claim of Chote and Nain was disputed by Desraj.

Chote and Nain put forward a pedigree that is substantially in accord with that on which the respondents now rely, except that they did not show any place in it for Desraj. They set up that Sukram's grandfather Mohan had one brother Dungar, of whom they were the grandsons.

Desraj, on his part, alleged that there had been a second brother of Mohan named Ram from whom he traced descent as

1. Vide *Jai Singh Pal Singh* v. *Bijai Pal Singh,* (1904) I.L.R. 27 A. 417—*KJR.*

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grandson, but in order to exclude Chote and Nain altogether he interposed a generation in the line of Chote and Nain, and showed them as great-grandsons of the brother of Mohan, from whom they were descended.

On the 3rd March the Revenue Court ordered the names of the appellants and Jai Singh to be entered on the Register.

On the 24th April, 1908, Desraj, Chote and Nain executed a sale-deed in favour of two sons of Kalyan Singh of their interests in the estate for Rs. 15,000, subject to the reservation to Desraj of 400 bighas, and to Chote and Nain of one-quarter out of their two-thirds shares. The estate is said to be worth two lakhs. There is no doubt that the purchase was made by Kalyan Singh, and that his sons were benamidars for him. The two sons and the heirs of Kalyan Singh, who is since deceased, are among the respondents.

On the 11th May, 1908, Desraj applied to correct his pedigree by omitting the interpolated generation so as to show himself in the same degree of relationship with Sukram as Chote and Nain, and to bring his pedigree into line with theirs.

On the 23rd May, 1908, the pargana officer passed an order confirming the order of the 3rd March, 1908.

The matter went to the Court of the Assistant Collector, and on the 27th February, 1909, the Assistant Collector gave judgment. He disallowed the claims of Lilawati and of the Mukhraulias. He accepted the pedigree put forward by Chote, Nain and Desraj, and allowed their claim as sapindas against that of the appellants and Jai Singh as *bandhu*, and he ordered the mutation of names in equal shares of Chote, Nain and Desraj.

On the 26th April, 1909, the Revenue Appellate Court at Aligarh restored the names of the appellants and Jai Singh, holding that the whole question of the succession to the estate would have to be decided by the Civil Court.

On the 29th September, 1909, the Commissioner of the Meerut Division on the appeal of Chote and Nain directed mutation in the names of Chote and Nain on the ground that a *prima facie* case had been made out. This decision was affirmed by the Board of Revenue on the 16th March, 1910. Desraj had not appealed. In these proceedings the present appellants neither proposed a different genealogy, nor pointed out any error in the pedigree put forward.

In the meantime, on the 12th January, 1910, the purchasers from Chote, Nain and Desraj applied for mutation.

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In these proceedings Desraj at first reverted to his original pedigree, but subsequently again came into line with Chote and Nain, and presumably mutation was directed so as to give effect to the decision of the Board of Revenue having regard to the rights of the purchasers under the sale-deed of the 24th April, 1908.

As the result of these proceedings Chote, Nain and Desraj, or their purchasers, obtained possession of the major part of the estate, and have since been in possession thereof.

In 1915, Lilawati began a suit to establish her claim as widow against Chote, Nain, Desraj and their purchasers. This suit was dismissed on the 24th January, 1917, and the dismissal was affirmed by the High Court on the 3rd March, 1920.

On the 27th January, 1920, the purchasers from Chote, Nain and Desraj began a suit (No. 122 of 1920) in the Court of the Subordinate Judge at Aligarh against the appellants and the children of Jai Singh, who had died, claiming to recover a small portion of the estate which had remained throughout in the possession of the appellants and Jai Singh or his heirs.

On the same day the appellants began a suit (No. 123 of 1920) in the same Court against Chote, Nain and Desraj and Kalyan Singh and his sons, and against Lilawati for a declaration of their title as next heirs to the estate in succession to Bejai Pal, and for possession so far as they had been dispossessed and for mesne profits.

These are the suits which give rise to the present consolidated appeal.

On the 27th May, 1921, the Subordinate Judge gave judgment in both suits in favour of the appellants, accepting their pedigree. Certain books of *pandas* and *jagas* containing entries relating to pedigree were produced and relied upon by the respondents. The Subordinate Judge treated the entries in these books as forgeries. He also treated as a forgery a deposition purporting to be made by Moti Ram and put on the file of the Court in connection with certain arbitration proceedings for rent in 1911. This deposition, in which Moti Ram was expressed to give evidence of pedigree in direct contradiction of his evidence in these suits, was sought to be used to discredit Moti Ram, who was the appellants' principal witness. The Subordinate Judge stated that he believed Moti Ram in all he said.

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On appeal the High Court of Judicature at Allahabad, by a judgment, dated the 23rd December, 1924, reversed the Subordinate Judge. Moti Ram was recalled before the High Court, and Karan Singh, the arbitrator, and his son were also called to give evidence as to the taking of the deposition of Moti Ram, alleged to have been a forgery. The High Court held that it was not proved beyond doubt that Moti Ram did make the deposition in 1911, and consequently they should not feel justified in rejecting Moti Ram's evidence for this reason. It is plain, however, that the High Court came to the conclusion upon the consideration of the evidence as a whole, and after seeing Moti Ram in the box, that he was not to be believed. Further, after the most rigid scrutiny of the books of the *pandas* and *jagas*, the High Court came to the conclusion that the entries relied on were genuine and conclusively established the respondents' case.

The evidence in this case falls into two categories: (1) the oral, and (2) the documentary. But it is to be observed that if the documentary evidence is genuine and admissible, it is of such a character as to support strongly the respondents' case and to afford firm ground from which to test the oral evidence.

The admissibility of documents of the class in question is not doubted, although having regard to their nature it is proper that they should be received with extreme caution and with a measure of suspicion.

The critical question, therefore, is, Are the relevant entries genuine?

The theory of the appellants is (1) that Chote, Nain and Desraj, who were living in the same neighbourhood as Sukram were not related to him, and that because they were not related to him they made no claim to his estate in any of the proceedings which took place before the death of Bejai Pal in 1908; (2) that after the death of Bejai Pal they were induced by Kalyan to put forward a false claim of which he affected to be the purchaser; (3) that since the death of Bejai Pal there has been going on continuous conspiracy on the part of Kalyan and his vendors to support by forgeries and suborned evidence a pedigree in their own favour; (4) that it was in pursuance of this conspiracy and with notable foresight that a forged deposition of Moti Ram was put on the file of the Court in 1911 in the hope that it might be of use at some future date to discredit Moti Ram if he should, as seemed probable, come forward as one of the principal witnesses of the other side in subsequent litigation; and

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(5) that the entries in the books of the *pandas* and *jagas* were forgeries made for the purpose of these suits, and that their non-production in any of the earlier mutation proceedings indicates want of genuineness.

The respondents' answer is (1) that Chote, Nain and Desraj were poor, and so long as Bejai Pal was living they were not interested unless they had been, as they were not, prepared to dispute the validity of his adoption; (2) that the sale was a genuine sale of a genuine claim; and (3) that the entries in the books are genuine and were produced for the first time at the trial because they had not been known before.

Now the learned Subordinate Judge has not dealt with the genuineness of the entries in the books upon any reasoned footing. He had no evidence before him directly bearing upon the topic of genuineness, except such as may have been afforded by the comparison of certain signatures. He pronounced the entries forgeries because they were inconsistent with the evidence of Moti Ram, whom he believed in all he said. For the same reason he declared that the impeached deposition was a forgery, although apparently he had not before him the original deposition or any satisfactory evidence of the circumstances in which it was alleged to have been made.

The High Court have, however, approached the matter from a different angle. The learned Judges have thought it proper to make a critical examination of the actual books and of the evidence, if any, supporting or impeaching the genuineness of the entries; and after what is described as "the most rigid scrutiny" of these books, the results of which appear in their judgment, they have come to the conclusion that the entries are undoubtedly genuine. They have also weighed the oral evidence directed to the rest of the case, and having seen Moti Ram, the principal witness for the appellants, they have rejected his evidence. Upon these findings the ultimate conclusion at which the High Court arrived was in their Lordships' opinion inevitable.

In their Lordships' judgment upon a review of the whole of the material, and after a full and critical examination of such material by counsel on either side, their Lordships see no reason to differ from the conclusion of the High Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The costs of the appeal will be borne by the appellants.

Solicitor for appellants: *H S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Bhimnath Missir and others .. *Appellants** (*Plffs.*)

v.

Srimati Tara Dai and others .. *Respondents* (*Defts.*).

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Bhimnath Missir v. Srimati Tara Dai.

Hindu Law—Compromise—Construction—Lineal descendants—Monthly allowance to a lady and her—Meaning of "lineal descendants" in—Married daughter of lady if entitled

In a case in which under a deed of compromise a monthly allowance of Rs 300 was given to a Hindu lady and her "lineal descendants," *held*, affirming the High Court, which had reversed the Sub-Judge, that the expression "lineal descendants" included all the descendants and was not restricted to male descendants, that every female claimant under the designation of "lineal descendants" had rights under the compromise, and that, therefore, a married daughter of the lady was entitled to participate in the allowance

Appeal No. 120 of 1927 from a decree of the High Court, Patna (Das and Adami, JJ.), dated the 5th May, 1926, which modified a decree of the Subordinate Judge of Bhagalpore, dated the 28th April, 1922.

Wallach for appellants.

Dube for respondents.

16th April, 1929. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—Their Lordships have heard with pleasure the address of Mr. Wallach in this case on behalf of the appellants, but having heard it and having carefully considered the views which he has presented, their Lordships do not find themselves in possession of any argument which would induce them to vary or differ from the judgment of the High Court of Judicature at Patna.

The opinion expressed in that judgment is in this language:

"In my opinion the term 'lineal descendants' includes all the descendants and is not restricted to male descendants. That being so, the daughters of Sreemati Moti Dai are clearly entitled to participate in the monthly allowance of Rs 300 per month."

Their Lordships are clearly of the same opinion. According to that opinion every female claimant under the designation of "lineal descendants" will have rights. Any arrangement

*P.C. Appeal No. 120 of 1927. *16th April, 1929.

made with one of the female lineal descendants such as that made with Sreemati Lakhmiswari Dai will of course stand, but beyond that the opinion now expressed by this Board is in favour of the wide and comprehensive scope of the term "lineal descendant" as given by the High Court.

Their Lordships will accordingly humbly advise His Majesty that this appeal be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *Chapman, Walker & Shephard.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE AND SIR JOHN WALLIS.

Hariram Serowgee .. *Appellant** (*Plff*).

v.

Madan Gopal Bagla and another .. *Respondents* (*Defts.*).

Hindu Law—Gift—Imperfect gift—Completed gift—Evidence—Agarwalla Jains—Gift to relatives on occasion of adoption and of marriage—Gift—Trust—Distinction—Executor—Legatee—Imperfect gift by executor to—Purchase in legatee's name in case of—Investment of legacy—Purchase out of funds of imperfect gift—Presumption—Evidence—Solicitors employed by executor for purposes of purchase—Evidence of—Admissibility—Evidence Act—S 21—Jains—Agarwalla Jains—Stridhan of mother—Son's right to—Damdupat—Hindu Law rule as to—Applicability—Approbate and reprobate—Rule against.

Plaintiff, an Agarwalla Jain, sued for two sums of money alleged to have been gifted to his mother, *M*, in accordance with the practice in the Agarwalla Jain community of making munificent presents to relatives on the occasion of adoptions and marriages, by her grandmother on the occasions of her adoption of a boy and of the marriage of that boy. The question for decision was whether the alleged gifts were imperfect gifts or were completed gifts.

At the time of the alleged gifts *M* was only about 15. *M's* grandmother carried on business on her own account, and maintained account books In her account books there was a ledger account in the name of *M*. which began in 1896 and was continued down to *M's* death in 1904. In 1901 there was an entry in the day book thus. "2,00,000, credited to *M's* account, dated 14th January, 1901, given credit to you on account of Chiranji Mahadeo Prasad" (the boy adopted by *M's* grandmother); and in 1903 another entry· "Rs 31,000 credited to *M's* account, presented on the occasion of Mahadeo Prasad's riding on horse at the time of his marriage ceremony" Those were the two alleged gifts. The account of *M* was carried on from year to year. Periodically it was credited with sums

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*P.C. Appeal No 88 of 1927. 17th December, 1928.

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received from debtors as interest; occasionally it was debited with sums for legal expenses or payments to her father-in-law as her guardian.

The books of the grandmother's firm showed her entering those sums, not in any cash book as sums received from and deposited by *M* or on her account, but as credits under her grand-daughter's name, which afterwards were divided by the grandmother's directions among *M's* children long after her death. There was no evidence that *M,* who lived up to 19 ever knew about any of the things which were done by her grandmother Neither she nor any one on her behalf gave any instructions or operated on the account at all, and whatever was done was done under the direction of the grandmother. There was no evidence that *M* ever in fact accepted the alleged gifts Though there were loans made to debtors and credits of interest received from debtors in the accounts under *M's* name, she was charged no commission as upon an investment of her moneys, nor did she draw on the income. No accounts were rendered; no correspondence passed.

Held, affirming the Courts below, that neither of the sums in question was ever the subject of a completed gift at all.

A declaration of trust in favour of a person retains the actual ownership in the trustee, while an endeavour to make a gift is an endeavour to divest the property and pass it away to the donee. Every step, therefore, taken towards proof of a gift is in itself *pro tanto* a negation of a trust

In a case in which a legatee objected to the Trial Judge's applying the rule of damdupat to the interest allowed on the legacy, on the ground that the claim for the legacy was not a matter of contract, it appeared that the legatee had claimed to have the benefit of a course of business, under which, so far as the accounts of the executrix's business went, all the items were treated as invested in commercial speculations for the legatee

Held, that the legatee could not both approbate and reprobate, and that he could not, on finding that the claim to the benefit of that course of business with its resulting contractual obligations, was not sustainable, claim that the executrix was a mere executrix, who had failed to apply assets which had come to her hands in discharging legacies, and was not a merchant banker, liable in contract to a customer for interest on the balances in her hands.

By his will, *B* bequeathed a legacy of a lakh of rupees to *M,* his grand-daughter and a minor After *B's* death, his widow, who was appointed executrix under his will, made certain incomplete gifts to *M* Subsequently *B's* widow laid out Rs 90,000 in buying a house for *M,* which was actually bought and in which she resided till she died. The question arose whether that sum of Rs 90,000 was provided out of the incomplete gifts, or out of the legacy of a lakh, to *M;* under her grandfather's will, which formed part of his estate in his widow's hands.

Held, that the presumption was strong that *B's* widow paid for the house out of the legacy, for which she clearly was liable, and not out of inchoate gifts, for which she had not yet made herself liable at all

Her (*B's* widow's) interest was to discharge old obligations, not to perfect new ones.

Held further, that the evidence of solicitors employed by *B's* widow in the matter of the purchase as to the object thereof was admissible in evidence and was neither hearsay nor irrelevant nor inadmissible under S. 21 of the Evidence Act

The peculiar Hindu rule of damdupat is applicable to matters of contract

Under the Mitakshara law as modified by the customs and usages of the Agarwalla community relating to stridhan, a son is entitled to whatever belonged to his mother during her lifetime.

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Hariram Serowgee v. Madan Gopal Bagla.

Appeal No. 88 of 1927 from an appellate decree, dated the 16th April, 1926, of the High Court, Calcutta (Sanderson, C.J. and Rankin, J.), which varied a decree, dated the 6th August, 1924, made by Thornhill, J., sitting on the Original Side of the said Court.

For the purposes of the present report the facts of the case are sufficiently set out in the judgment of the Privy Council.

On the question of imperfect gifts, the Trial Court (Mr. Justice Thornhill) observed as follows:—

> "The cases show, so far as I understand, as between donor and donee, that if the owner of personal property, with which we are concerned, wished to give the enjoyment of it to another he can do so by either (1) declaring himself to be a trustee of it for those whom he desires to benefit, (2) or by validly transferring the property to such other and not retaining it in his own hands for any purpose, fiduciary or otherwise If such intended transfer is not valid, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. In one case it is said for a man to make himself trustee there must be an expression of intention to become a trustee In another, he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it and use expressions which have that meaning. The question will therefore arise in considering some of the transactions whether there has been a completed gift, followed by a deposit with the firm of the gifted moneys or whether the donor, instead of making a completed gift, constituted himself or herself a trustee of the moneys for the person whom he or she wished to benefit "

De Gruyther, K.C. and *Parikh* for appellant.

Lowndes, K.C. and *MacNair* for respondents.

During the course of the argument, reference was made to section 21 of the Indian Evidence Act, and to *Miller* v. *Babu Madho Das.*[1]

17th Dec. 1928. Their Lordships' judgment was delivered by

Viscount Sumner.

VISCOUNT SUMNER.—The appellant claimed certain sums held at her death by Brijcomari, the widow of a banker and money-lender in Calcutta, Rangoon and elsewhere, named Bhagwandas Bagla, who was an Agarwalla Jain. He is the only son and youngest child of Mahadevi, deceased, a grand-daughter of Bhagwandas and Brijcomari, and the respondents are the surviving executor and the residuary legatee under Brijcomari's will. It is undisputed that, under the Mitakshara law as modified by the customs and usages of the Agarwalla community relating to stridhan, the plaintiff is now entitled to whatever belonged to his mother Mahadevi during her lifetime. Originally the action was

1. (1896) L.R. 23 I.A. 106· I.L.R. 19 A 76 (P.C).

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brought for an account, but at the trial this was abandoned and the plaintiff elected to rely only on his claim for sundry specific items. The defendants subsequently agreed to this course being taken, relinquishing also any claim to any set-off or account on their side. For several of the relevant years Brijcomari's books of account were not forthcoming, having been, it was said, lost in a riot or consumed in a fire. This may have deprived the plaintiff of useful evidence and the defendants of circumstances proving a discharge. At any rate the matter rests there, as it was not held that the defendants had made away with the books. The entries relating to Mahadevi were such as might be inserted in a day book and cash book and then by transference in a ledger in the case of a customer, who had placed money to her credit with her agents, with instructions to invest it and collect the interest on the investments for her account and to make disbursements against it as she might from time to time direct. This picture, however, is far from the reality. When the account was opened Mahadevi was a child of eleven. When the gifts to her, on which the claims are founded, are supposed to have been made she was about fifteen. Neither she nor anyone on her behalf gave any instructions or operated on the account at all, and whatever was done was done under the direction of Brijcomari. Of these items only three survive on this appeal. Two relate to sums alleged to have been given by Brijcomari to Mahadevi and the third to a legacy left to Mahadevi by her grandfather, Bhagwandas, under a will of which his widow, Brijcomari, was executrix.

Evidence was given, which may be accepted, that in the Agarwalla Jain community there is a practice on the occasion of adoptions and marriages to make money presents to relatives on a scale that may be called munificent. The first claim in this appeal is in respect of two lakhs of rupees, alleged to have been given to Mahadevi on the occasion when Brijcomari adopted Mahadeo, her grandson and Mahadevi's brother, as her own son in 1901, and of Rs. 31,000 alleged to have been given to her when Mahadeo was married a short time afterwards. The remaining claim is for Rs. 90,000, part of the legacy above mentioned, the remainder of it not being now in dispute. There is also an issue as to the amount of interest to be allowed.

After the death of Bhagwandas his widow carried on his business on her own account, and as it was a business on a large scale it involved a full system of book-keeping. A ledger account in the name of Mahadevi begins in 1896 with a credit of Rs 24,968. This represents a principal sum carried forward from a previous ledger with periodic amounts for interest,

some credited in the lifetime of Bhagwandas, some after his death. In respect of this claim the plaintiff succeeded in India, Brijcomari and another executor of the will of Bhagwandas having made affidavits in connection with it in proceedings in Rangoon that this sum represented a trust created in Mahadevi's favour by the testator. It was on this evidence and not on the mere method of entering these sums in the books that the Courts decided in the plaintiff's favour. Mahadevi's account is continued through the books down to her death in 1904. In 1901 there is an entry in the day book thus: "2,00,000 credited to Bai Mahadevi's account, dated 14th January, 1901, given credit to you on account of Chiranji Mahadeo Prasad," and in 1903 another entry: "Rs. 31,000 credited to Bai Mahadevi's account, presented on the occasion of Mahadeo Prasad's riding on horse at the time of his marriage ceremony." These are the two alleged gifts. The account of Mahadevi is carried on from year to year. Periodically it is credited with sums received from debtors as interest; occasionally it is debited with sums for legal expenses or payments to her father-in-law, Fulchand, as her guardian. There is no evidence that Mahadevi, who bore her husband Padamraj three children and then died at the age of nineteen, ever knew anything about any of these things, but Padamraj—a witness of whose credibility the trial Judge had but a poor opinion—gave an account of this "riding on a horse," which shows it to have been part of the wedding ceremonial that is often an occasion for making presents. Further entries in the day book relating to Mahadeo show a curious state of things. Two lakhs are debited to him as having been credited to Mahadevi's account on January 17, 1901, and transferred from his account. This is part of a gross sum of seven lakhs and three-quarters, debited to him, of which the residue, five lakhs and three-quarters, are entered as credited to the father of Mahadeo on the occasion of Mahadeo's adoption, which took place shortly before his marriage. The death of Mahadevi occurred on 17th May, 1904, and in 1913 there are entries in the day book showing that the balance of Mahadevi's account, 4 lakhs and Rs. 69,128, which then stood to her credit, was exhausted by (1) a transfer of 1 lakh and Rs. 39,125 to the firm of Fulchand Padamraj, that is, the firm of Mahadevi's father-in-law and husband, being the amount standing against the name of Fulchand Padamraj in the account books of one Calcutta firm; (2) by purchases of jewellery for the plaintiff, which do not seem to have been in dispute, and, finally, (3) by transferring 3 lakhs Rs 19,203 in equal thirds to Mahadevi's children,

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the plaintiff and his two sisters, "under orders of Bai Muni's mother," that is, of Brijcomari, whose death occurred in 1916.

So far as concerns the two disputed items of 2 lakhs and Rs. 31,000, alleged to have been given to Mahadevi in connection with the adoption and subsequent marriage of Mahadeo, the story is therefore as follows. The books of Brijcomari's firm show her entering these sums, not in any cash book as sums received from and deposited by Mahadevi or on her account, but as credits under her grand-daughter's name, which afterwards are divided by Brijcomari's directions among Mahadevi's children long after her death. Brijcomari had no right to adopt any son during the lifetime of Lachmi Narayan, already adopted by her deceased husband, and least of all a boy, who was grandson to Bhagwandas already. She appears by these entries to have laid hands on the fortune thus supposed to accrue to Mahadeo, in order to buy off his natural father by one large payment and to endow his sister with another, and then again to have seized on the deceased Mahadevi's estate, applying a large part of it to satisfy her own claims on the embarrassed firm of Fulchand Padamraj, and dividing the residue between Mahadevi's children, with as little regard for legal rights as she had shown in the adoption proceedings some years before. The recital in the deed of 24th February, 1920, to which the respondents were parties, stating that "certain sums of money" given by Brijcomari to Mahadevi, out of which Gigi Bai, the plaintiff's sister, received a third share, does not in itself prove a completed gift by Brijcomari, since she was dead years before the payment, and it is not relied on as an estoppel. The accounts in themselves are mere book-entries and do not confer or determine rights, but, whatever else they show, they do not show completed gifts to Mahadevi. It is not pretended that Mahadevi received any money and then deposited it in her grandmother's bank or that she ever in fact accepted these gifts Nor did Brijcomari make herself the bailee of Mahadevi by any unequivocal act, which changed the character of her own continuous possession. Though there are loans made to debtors and credits of interest received from debtors in the accounts under Mahadevi's name, she is charged no commission as upon an investment of her moneys, nor does she draw on the income, of which an appearance of ownership is thus created. No accounts were rendered; no correspondence passed. When Brijcomari is so minded, she manipulates the account and makes transfers exactly as she pleases, and, finally, being admitted to have been in control of the whole business and keenly interested in it, she divides up

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the account and brings it to a close as to her seems good. The Courts below correctly appreciated and applied the rules of law relating to imperfect gifts, and their conclusion that neither of these sums was ever the subject of a completed gift at all must be affirmed. There was no pleading nor contention before the Trial Judge that Brijcomari had made any declaration of trust in Mahadevi's favour in respect of either of these sums, and, though it was admitted in the High Court that, if a declaration could be proved the want of the proper pleading ought not to disentitle the plaintiff to recover, it is clear that no such proof was possible. Every step taken towards proof of a gift was in itself *pro tanto* a negation of a trust, for a trust retains the actual ownership in the trustee, while an endeavour to make a gift is an endeavour to divest the property and pass it away to the donee. All that was proved was a series of acts, which might, if carried far enough, have amounted to completed gifts, but in fact stopped short of completion. Brijcomari always retained the power to cancel all that she had done, whenever she changed her mind, and that change did eventually take place in 1913.

The claim relating to the legacy stands thus. Brijcomari laid out Rs. 90,000 in buying a house for Mahadevi, which was actually bought and in which she resided till she died. The question is, was this sum provided out of gifts, which were otherwise incomplete, or out of the legacy of a lakh, to Mahadevi, under her grandfather's will, which formed part of his estate in Brijcomari's hands? The presumption is strong that Brijcomari paid for the house out of the legacy, for which she clearly was liable, and not out of inchoate gifts, for which she had not yet made herself liable at all. Her interest was to discharge old obligations, not to perfect new ones. There was, however, ample evidence to establish the conclusion at which the High Court arrived on appeal, that this purchase money was a part satisfaction of the legacy. At the trial Brijcomari's solicitors were ready to give formal evidence of what had happened, refreshing their memory with the entries in their office diary. By consent of counsel the diary was read instead, as if it had been formally proved. Thus, what is for the purpose of this case the evidence of Brijcomari's solicitors showed, that they were instructed to investigate the title to the house in furtherance of an investment of nine-tenths of the legacy in its purchase. They did so; were satisfied; and carried the purchase through. This was conclusive. An attempt was made to contend that their evidence as to the investment was hearsay and irrelevant in itself, and in-

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admissible under the Indian Evidence Act, section 21. Their Lordships do not accept this and the contention fails.

The remaining point is a challenge of the course taken by the Trial Judge in applying the rule of damdupat to the interest allowed. This peculiar Hindu rule is applicable to matters of contract, and the contention was that the claim for the legacy was not a matter of contract. As, however, the plaintiff had claimed to have the benefit of a course of business, under which, so far as the accounts of Brijcomari's business go, all the items were treated as invested in commercial speculations for Mahadevi, he cannot both approbate and reprobate, nor can he, on finding that the claim to the benefit of that course of business with its resulting contractual obligations, is not sustainable, claim that Brijcomari was a mere executrix, who had failed to apply assets which had come to her hands in discharging legacies, and was not a merchant banker, liable in contract to a customer for interest on the balances in her hands.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Morgan, Price, Marley & Rugg.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Thayammal and others .. *Appellants* in Appeal No.* 132 *of* 1927 *and Respondents in A.A.O. No.* 336 *of* 1927 *(Defts. and Petnrs.)*

v.

A. T. Muthukumaraswami Chettiar .. *Respondent in Appeal No.* 132 *of* 1927 *and Appellant in A.A.O. No.* 336 *of* 1927 *(Plff. and Respdt.).*

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Evidence Act (I of 1872), *S* 68 *as amended by Act XXXI of* 1926—*If retrospective—Limitation Act, Ss* 20 *and* 21 (2)—*Mortgage bond—Endorsement of payment of interest—Endorsement signed by all the mortgagors except one—If saves limitation against him—"Chargeable"—Meaning of*

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*Appeal No. 132 of 1927 and A.A.O No 336 of 1927. 2nd August, 1929.

The amendment of S 68 of the Evidence Act by Act XXXI of 1926 is a provision relating to processual law and not to substantive law and therefore must be taken to be retrospective in its operation

An endorsement of payment of interest on a mortgage bond which is not signed by one of the mortgagors does not save limitation, as against that mortgagor, where there is nothing on record to show that those who signed the endorsement were specifically authorised by him for that purpose. The mere fact that the payment of the money for interest enures for the benefit of all the mortgagors cannot constitute a specific authorisation within the meaning of section 20 of the Limitation Act.

The mere fact that interest on a mortgage is paid as such by one of two co-mortgagors does not save limitation as against the other co-mortgagor.

The word "chargeable" in section 21 (2) of the Limitation Act *prima facie* means every kind of chargeability possible by reason of sections 19 and 20 of the Act, that is, every kind of chargeability under the original contract, and is not limited to personal liability only in the case of a mortgage

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore, dated 25th September, 1926, in Original Suit No. 68 of 1925 and Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated 6th September, 1927, in M.P.R. No. 185 of 1927 in C.S. No. 68 of 1925.

K. Balasubramania Aiyar and *K. Venguswami Aiyar* for appellants.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar and *R. Sriramachariar* for respondent.

The Court delivered the following

JUDGMENT. *Appeal No.* 132 *of* 1927.—In this Appeal defendants 1 to 3 are the appellants before us. The plaintiff brought the suit on a mortgage bond, dated the 24th October, 1907 The present suit was filed on the 17th October, 1925. To save the bar of limitation the plaintiff relied on a payment of Rs 10 towards interest on the 17th October, 1913, which purports to be endorsed on the mortgage bond and is exhibited as Ex. A-1. The Subordinate Judge decreed the plaintiff's suit as framed with further interest. Hence this appeal.

Ex. A-1 the endorsement was signed by the 1st defendant and the 2nd defendant for himself and as guardian of his younger brother the 4th defendant. It is said that the 3rd defendant was then absent at Singapore and that the endorsement was signed on his behalf also, but there is no signature which purports to be on his behalf. So far as the 1st and 2nd defendants are concerned, the main point that was argued for the appellants was that though the signatures on the endorsement are genuine the endorsement was interpolated after the signatures were made, that there was in fact no payment on the 17th October, 1913,

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and that what was represented to the defendants was that an endorsement will be made consisting of the earlier payments, which were really made. Beyond the bare suggestion, there is nothing to support this contention of the defendants. The 1st and 2nd defendants have not gone into the box to support this contention. On the other hand, the plaintiff has gone into the box and sworn to a payment of Rs. 10 on that date. This payment appears in the plaintiff's day book, Ex. D, at page 515. The actual entry was written by one Venkatachala Chetti and his writing is proved by his son P.W. 2. This contention on behalf of the appellants 1 and 2 therefore fails.

Another contention raised on behalf of the appellants may also be disposed of. It is that Ex. A has not been duly proved. It bears the signatures of five attestors and the writer. All these are dead except one, namely C. Vadivelu Pillai. It is argued that Vadivelu Pillai has not been called as required by S. 68 of the Evidence Act. This section of the Evidence Act has been recently amended by Act XXXI of 1926. None of the defendants has denied the genuineness of the suit mortgage bond. The 1st defendant only said that it has not been duly attested and that the plaintiff should prove strictly the genuineness but admitted her own execution. The 2nd defendant never filed a written statement. The 3rd defendant also did not plead that he did not execute the bond. We think the amendment is a provision relating to processual law and not to substantive law and, therefore, must be taken to be retrospective in its operation. That being so, it is not necessary to call the only living attestor. This contention, therefore, also fails. The result is the appeal of defendants 1 and 2 should be dismissed with costs.

There remains the appeal of the 3rd defendant. His learned Advocate argues that the suit is barred by limitation as against him. The endorsement, dated 17th October, 1913, was not signed by him and there is nothing on record to show that those who signed the endorsement were specifically authorised for that purpose. The mere fact that the payment of the money enures for the benefit of all the defendants cannot constitute a specific authorisation to sign the endorsement on their behalf within the meaning of section 20 of the Limitation Act. There are certain later payments towards Ex. A but these were not relied on in the plaint as saving limitation and even if we are inclined to look at them for this purpose, all that we have got is that the payment in 1915 and one payment in 1918 were made by Vadivelu Pillai, the attestor abovenamed. Another payment in 1918 and another in 1919 do not appear to have been made by

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any specific person. Another payment in 1920 was made by one Munusami Padayachi. These facts appear from Ex. D, the plaintiff's later day book. There is no evidence that Vadivelu Pillai or Munusami Padayachi was specifically authorised to pay the amounts on behalf of the 3rd defendant. It is true that there is evidence that Vadivelu Pillai had been managing the defendants' family affairs. He was permanently living and messing with the defendants in the same house and he was an inmate of the defendants' house even during his wife's lifetime and he was paying *theerva* on behalf of the defendants. But in our opinion all these do not constitute a specific authorisation within the meaning of section 20 of the Limitation Act, vide *Bapanna* v. *Bheemalingam*.[1] We, therefore, hold that there is no payment of interest as such by any person authorised by the 3rd defendant to pay on his behalf.

In the plaint there is an allegation that the 3rd defendant ratified these payments. Paragraph 9 (*a*) of the plaint says that he "agreed thereto" and "acquiesced therein" and "admitted it" and "ratified it." In proof of this so-called ratification, Ex. F was relied upon The appellants object that this was filed at a very late stage but it is unnecessary to go into this question as Ex. F does not purport to ratify any act done by others on behalf of the 3rd defendant. It is merely a letter praying for more time. Assuming that it relates to the suit document, the letter being written on the 24th December, 1921, more than 12 years after the date of the document, it cannot operate as an acknowledgment, nor can it amount to a fresh promise. Ex. F, therefore, does not avail the plaintiff so far as the 3rd defendant is concerned.

It is then contended for the respondent that under S. 20 of the Limitation Act it is enough if the interest on the debt is paid as such by any person liable to pay the debt. It is true that the words "the person liable to pay the debt" were construed to mean any person liable to pay the debt. Vide *Askaram Sowkar* v. *Venkataswami Naidu*[2] relying on *Bolding* v. *Lane*[3] and *Chinnery* v. *Evans*.[4] But that was a case to which section 21 of the Act would not apply and there could be no suggestion that the operation of section 20 was cut down by that of section 21, clause (2). In the case of several joint contractors, partners, executors or mortgagees, the operation of section 20

1. (1916) 3 L W. 231
2 (1920) I L.R. 44 M. 544 40 M.L.J 218
3 (1863) 1 De G.J & Sm 122
4 (1864) 11 H.L. Cas. 115.

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seems to be cut down or limited by section 21 (2) of the Act. The decision in *Lewin* v. *Wilson*[5] does not help the respondent. That was an appeal from New Brunswick and though Ss. 29 and 30 of the New Brunswick Act are a reproduction of the corresponding sections in the English Statute, 7 Will. and 4 and 1 Vict. c. 28, and they correspond to our sections 19 and 20, it does not appear that there is a section in the New Brunswick Act corresponding to our section 21 and if there is one, what its exact terms are. It is then argued by Mr. Krishnaswami Aiyar, the learned Advocate for the respondent, that in section 21 the word "chargeable" means personally chargeable and does not affect chargeability as to property; and therefore where the main liability included liability as to property and a personal liability, while the personal liability is cut down by section 21, the liability as to property remains on the construction of section 20; only where the main liability itself is a personal liability, the result of section 21 is to make the suit wholly barred. In support of this contention *Achola Sundari Debi* v. *Doman Sundari Debi*[6] and *Ibrahim* v. *Jagdish Prasad*[7] are the only Indian cases referred to, but in those cases the learned Judges have not adverted to section 21 of the Limitation Act at all. They were confined merely to the interpretation of section 20. Those decisions therefore do not help us. The learned Advocate then relied on a decision in *In re Macdonald. Dick* v. *Fraser*,[8] a decision of Stirling, J., as he then was. It was a decision under Lord Tenterden's Act (9 Geo. 4, c. 14), S. 1. The question there was whether an acknowledgment made by one of several executors binds a testator's estate in the hands of the surviving executor, the original liability being that of the testator. In the first place, that section and our section 21 (2) are not identical. Section 21 refers to "partners" and also "mortgagees," but these are not mentioned in Lord Tenterden's Act. Whereas section 21 refers generally to executors, Lord Tenterden's Act refers to executors of any contractor. Again S. 21 refers to both cases of acknowledgment and payment, whereas Lord Tenterden's Act refers to acknowledgment or promise only and not to payment. It is unsafe to assume that the same result was intended in the two Acts even in the case of joint contractors or executors. The case did not go to the Court of Appeal and the point has not since arisen. So far as executors are concerned, its effect has been incorporated in the text-

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5 (1886) 11 App. Cas 639.

6 (1925) 90 I C. 774

7 A I.R. 1927 A 209

8. (1897) 2 Ch. 181.

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books—*vide*, for example, Lightwood on Limitation of Actions—but such statements are confined to executors only. In the course of Stirling, J.'s judgment he relied on Chitty's judgment in *In re Hollingshead. Hollingshead* v. *Webster*,[9] where reference to a similar section, namely, section 14 of the Mercantile Law Amendment Act, was made. In that case the payment was made by a devisee for life and the question was whether it was a sufficient acknowledgment to bind the remainderman. Chitty, J., relied on the general observations of Lord Cranworth in *Roddam* v. *Morley*[10] and held that it was a sufficient acknowledgment. This view is in consonance with the view since adopted by the House of Lords in *Chinnery* v. *Evans*[4] and *Lewin* v. *Wilson*.[5] In the course of the argument Mr. Swinfen Eady (as he then was) said that the admission of a debt by an executrix will not take it out of the statute so as to enable a creditor to obtain payment out of the testator's real estate. What use he actually made of section 14 of the Mercantile Law Amendment Act does not appear from the report, but Chitty, J., in the course of the judgment says that Mr. Swinfen Eady's argument was that the estate was not liable and that the executor who made the acknowledgment was personally liable, and he said that this argument was founded on section 14 of the Mercantile Law Amendment Act. Chitty, J., then observed that that was an extraordinary result and he proceeded to observe that some reasonable interpretation should be put on the words "so as to be chargeable." The interpretation that he suggested was that the co-executor who has not paid is not to be personally chargeable as for a *devastavit*. Thus it is seen that the interpretation of the word "chargeable" did not actually arise in the case. The discussion about it arose only because Mr. Swinfen Eady tried to support his argument by the analogy of the case of two executors and his further argument as to who would be liable in their case. We think it is unsafe to cut down the plain language of section 21 by reason of these two cases in *In re Macdonald. Dick* v. *Fraser*[8] and in *In re Hollingshead. Hollingshead* v. *Webster*.[9] The former related to the case of executors and in the latter the point did not actually arise. Whatever may be the law as to executors, it is impossible to say that of two joint contractors—which term has been held to include two mortgagors in this Court (vide *Muthu Chettiar* v. *Muhammad Hussain*[11])—one contractor is bound by the

4 (1864) 11 H L. Cas 115
5. (1886) 11 App Cas 639.
8 (1897) 2 Ch 181.
9 (1888) 37 Ch. D 651
10. (1857) 1 De G & J 1.
11. (1919) 55 I C. 763

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payments of the other. The word "chargeable" in section 21 must *prima facie* mean every kind of chargeability possible by reason of sections 19 and 20 of the Act, that is, every kind of chargeability under the original contract, and the term cannot be limited to personal liability only.

The result is, we think, that the suit is barred so far as the 3rd defendant is concerned. We allow this appeal and the suit is dismissed as against him with costs throughout. Half the pleader's fee only is allowed. But the appeal of defendants 1 and 2 is dismissed with costs. Time for payment is extended to four months from this date.

N.S. *Appeal allowed in favour of 3rd defendant and dismissed against Defendants 1 and 2.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD TOMLIN, LORD SALVESEN AND SIR JOHN WALLIS.

Sheth Mafatlal Gagalbai .. *Appellant** (*Plff.*)

v.

Sheth Jivanlal Girdhardas and another .. *Respondents* (*Defts.*).

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Privy Council—Practice—Concurrent findings on question of fact—Interference with—Partnership—Oral agreement of—Findings as to

Where the question was whether an oral agreement of partnership had been made on 30th July, 1915, and the Courts below concurrently found on evidence upon which those findings could have been reached, that, if there had been any concluded agreement at all reached upon 30th July 1915, it was subject to a condition precedent, and that that condition precedent had not been fulfilled, *held*, that there did not exist in the case any circumstance which would justify their Lordships in reviewing those findings in view of the practice of their Lordships' Board, as stated by Lord Dunedin in *Robins* v. *National Trust Company*, (1927) A.C. 515

Appeal No. 160 of 1927 from a decree of the High Court, Bombay (MacLeod, C.J. and Coyajee, J.). dated the 23rd February, 1926, which confirmed with a variation only as to the order for costs a decree of the Court of the Subordinate Judge of Ahmedabad, dated the 31st July, 1924, and dismissed a suit which the appellant had brought in that Court.

The question for determination in this appeal was whether the appellant and the respondents were partners in a lease of The Ahmedabad New Spinning and Manufacturing Company

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*P.C. Appeal No 160 of 1927. 4th June, 1929

P. C.

Sheth Mafatlal Gagalbai v. Sheth Jivanlal Gudhardas.

and in The Ahmedabad New Textile Mills Company, Limited. Respondents denied the partnership and both Courts in India found against the appellant's claim.

Their Lordships' decision turned upon the short ground that there were concurrent findings by the Courts in India on questions of fact sufficient for the disposal of the present appeal.

Greene, K.C., Raikes and *McNair* for appellant.

Upjohn, K.C., De Gruyther, K.C. and *Parikh* for respondents.

Greene, K.C.—There are no concurrent findings of fact here. The judgment of the Board in *Satgur Prasad* v. *Raj Kishore Lal*[1] qualifies the rule as to concurrent findings.

The rule does not apply where you are drawing an inference from the language used in a document.

[*Sir John Wallis.*—Is it your case that it is a question of misconstruction of documents here?]

[*Lord Tomlin.*—A question of construction is, undoubtedly, a question of law.]

The terms of the agreement were reduced to writing and it was not therefore competent to the Court to go outside the document. Oral evidence was not admissible: *see* Evidence Act, S. 91.

[*Lord Tomlin.*—That section has no application to the present case. The section contemplates a case where a party produces a written contract, and according to the well-known rule of English Law, you are precluded from giving oral evidence.]

[*Sir John Wallis.*—Section 91 of the Evidence Act refers to a document where there is a written contract.]

4th June, 1929. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 23rd February, 1926.

By this decree the High Court affirmed, with a variation as to costs, a decree of the Subordinate Judge of Ahmedabad, dated the 31st July, 1924, whereby a suit of the appellant against the respondents was dismissed.

The appellant's claims in the suit were:—

(*a*) For a declaration of his right to a four annas share of the profits which the respondents and others had made by working the properties of the Ahmedabad New Spinning and

1. (1919) L R 46 I A 197 I L R 12 A. 152. 38 M L J. 259 (P C.).

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Lord Tomlin.

Manufacturing Company (which will be referred to hereafter as the old Company) under a lease from the holders of debentures in that company, and for payment by the respondents of that share of those profits when ascertained;

(*b*) For a declaration of his right to a one and a half annas share of the commission earned by the respondents and others as agents of the Ahmedabad New Textile Mills Company, Limited (which will be referred to hereafter as the new Company) and of his right to payment of that share by the respondents, and for payment by them of that share in the commission earned to date of suit.

The claim is based upon an oral agreement of partnership alleged to have been made on the 30th July, 1915.

The events which led up to the alleged agreement are as follows:—

The old Company was formed in 1894, and in 1909 raised a loan of 5 lacs by the issue of 1,000 mortgage debentures of Rs. 500 each, secured by a trust deed. Jeynarayan Hindumal Dani was a trustee for the debenture-holders; he was also managing director of the Bombay Merchants' Bank, Limited. The Bank held debentures for Rs. 1,25,000. A further part of the issue, *viz.*, Rs. 2,25,000, was held by one Motilal.

In or about March, 1911, the old Company made default upon the debentures, and the trustees of the trust deed, in exercise of the powers conferred by such deed, took possession of the properties of the old Company, including its spinning mill.

In May, 1914, the trustees let the mill to one Dolatram. The lease or tenancy agreement to Dolatram has not been produced, but apparently his tenancy expired on the 25th February, 1915.

On the 21st November, 1914, the trustees, according to the appellant's case, agreed to let to him the mill for a year from the expiration of the tenancy of Dolatram at a rent which would not exceed a maximum of Rs. 36,000 per annum. This agreement has not been produced and the terms of it have not been proved

About the same time the appellant made an offer to buy the Bank's debentures, and on the 28th November, 1914, this offer was considered by the Board of Directors of the Bank, and Dani was authorised by the Board to negotiate for the sale of the debentures provided half of the consideration was paid in cash at once and the other half within six months from the date of the arrangement.

Two letters, one from Dani to the appellant, dated the 21st November, 1914, and the other from the appellant addressed

to the Bank, dated the 29th November, 1914, purport to contain the terms of an agreement made between the appellant and the Bank, whereby the appellant is expressed to become the purchaser of the Bank's debentures with the accrued interest due thereon for Rs. 1,41,000, to be paid in cash on the transference of the debentures.

It appears from the appellant's own evidence and from the evidence of Ramanbhai, who was Dani's lawyer, that the arrangement embodied in these two letters was by virtue of an oral agreement between the appellant and Dani, only to be operative if the appellant got possession of the mill, and that for this reason Ramanbhai retained the letters.

In December, 1914, some of the debenture-holders became aware of what was going forward, and believing that Dani in his arrangements with the appellant was sacrificing the interests of the debenture-holders to the interests of the Bank, addressed a letter to the trustees protesting against the leasing of the mill to the appellant.

Notwithstanding this protest, Dani and the appellant attempted without success to secure the assent of Dani's co-trustees to a modification of the appellant's agreement for a lease by making the tenancy term run, in the event of Dolatram not giving up possession on the 25th February, 1915, from the date when he should in fact give up possession; certain expenses being, however, paid by the appellant. A document embodying these terms was signed by Dani and the appellant. The other trustees did not sign it.

In the meantime, an order was made for the compulsory winding up of the old Company, and a liquidator, was appointed.

After his appointment the liquidator, in the name of the old Company, launched a suit at Ahmedabad against the trustees of the debenture trust deed for a declaration that the debenture loan was not binding on the old Company and for recovering possession of the properties of the old Company from the trustees.

On the 20th February, 1915, the liquidator obtained a temporary injunction restraining the trustees from entering into any agreement with the appellant or handing over possession of the properties of the old Company to the appellant or to anyone either as tenant or otherwise.

A temporary injunction to a similar effect was also obtained for a short time by a debenture-holder in another suit.

When the 25th February, 1915, arrived, Dolatram refused to go out of possession of the mill. Subsequently the liquidator

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invited tenders for the purchase of the properties of the old Company.

On the 21st March, 1915, a tender was submitted to the liquidator by the respondent Jivanlal, acting for himself and the respondent Mangaldas. It was in effect an offer to buy the properties of the old Company for Rs. 7,25,000, of which Rs. 5,50,000 were to be applied in satisfying the claims of the debenture-holders.

On the 29th March, 1915, the tender of the respondent Jivanlal was accepted and sanctioned by the Court subject to a valid arrangement being effected with the debenture-holders.

At the end of July, 1915, no arrangement had been made by the respondents with the debenture-holders, and Dolatram was still in possession of the mill.

The next material event is the critical one in the case.

On the 30th July, 1915, a conference took place between the appellant and the respondents. One Nathubhai, a pleader, was also present. It is alleged by the appellant that an oral agreement was on that occasion reached between himself and the respondents. Upon that alleged oral agreement he is now suing.

At that conference a draft of terms was prepared by Nathubhai in pencil, and after alterations had been made in the draft in ink the appellant signed it. The respondents did not sign it. The draft remained in the possession of Nathubhai.

The draft was in the following terms:—

"I, Sheth Mafatlal Gagalbhoy, residing in Danapur, in the City of Ahmedabad, passing the writing, to Parikh Jivanlal Girdharlal, residing in Sankdi Sheri Nanabhai Munshi's Pole, in the City of Ahmedabad, give in writing this agreement that—

"I have taken over the working of the Mills of the Ahmedabad New Spg & Mfg. Co, Ltd, from the Trustees of the Debenture-holders of the Company, Messrs Jayanarayan Hindumal Dani and Ambalal Harivallabhdas, on a lease or *Bhada Khata*, dated 21st November, 1914

"Moreover, I have executed a document in favour of the said Trustees whereby I am to pay to them on my receiving possession of the Mills in pursuance of my lease the expenses incurred by them on account of the said Mill, and I am to recoup the same from the amounts payable by me

"I have taken you as a partner on the following conditions, in all my rights and liabilities under the said lease Our said partnership is to be under the name of Sheth Mafatlal Gagalbhai and Company.

"(1) I have purchased for Rs 1,41,000 the debentures of the said Mill held by the Merchants' Bank of the face value of Rs 1,25,000, with all the rights to interest, etc, accrued in respect thereof, and the condition is that I am to pay the said amount on (my) getting possession of the Mill You should pay this amount, which shall be paid on account of our partner-

ship, on getting possession of the Mill; and the balance due to the trustees out of the amount spent by them is to be paid by me in pursuance of my agreement with them, on obtaining possession of the Mill, and to be recouped by me from the amounts payable to the Trustees under the lease. You have to pay that amount on getting possession of the Mill and recoup that from the amounts payable to the Trustees. You are entitled to charge in the partnership accounts interest at the rate of 6 per cent. per annum on both the said amounts which you will advance on account of the partnership; and the said interest is to be treated as expenses in the accounts of the working of the Mill and to be recovered by you as such.

"(2) You are to provide all the funds necessary for working the said Mills; and you are entitled to charge thereon interest at the rate of 6 per cent. per annum; and that amount (of interest) is to be treated as expenses in the accounts of the working of the Mills

"(3) You are to conduct the entire management of the (working of) the Mill, and I am not to interfere therein in any manner.

"(4) In consideration of your locking your funds as provided in clauses 1, 2, 3 above for working of the Mill, etc., as also in consideration of your working the Mill, you are to be paid from surplus remaining after deducting 2½ per cent. for charity of the net profits earned by our partnership in the proportion of six annas in a rupee of 16 annas.

"Yours is the authority to dispose of the amount of the 2½ per cent. set apart from the net profits for charitable purposes as stated above.

"(5) After setting apart as provided above 2½ per cent for charity and six annas as your special (share) out of the net profits of our partnership, you are to receive six annas as your share, and I am to receive four annas as my share out of the remaining ten annas In case there be loss to the partnership, i.e., in the working and in respect of the purchase of debentures as well as in the capital and interest, etc., as also in the monies which are to be advanced to the trustees as mentioned above, the said loss is to be borne by you in the proportion of ten annas in the rupee and by me in the proportion of four annas, calculating ten annas as equivalent to a rupee.

"(6) The amount to be treated as the net profit will be the amount remaining after the treating as expenditure the interest of the money advanced by you or borrowed from you for working of the Mill, for labour, stores, coal, ground rent, taxes and management, as well as the Adat which may have to be given to any Shroff other than the firm of Sheth Girdharlal Jethabhai—as also the interest on the money required for the purchase of the Debentures, as well as the interest on the monies to be advanced to the Trustees for the remaining amount spent by them, as well as all necessary expenses in connection with the working, as also repairs to the machinery for keeping it in working condition, as well as in replacing broken parts, as also in making repairs to or alterations in the buildings, and such net profits should be divided according to the respective shares every year, and if there be any loss to the partnership as stated above it should be recouped every year in the above proportion.

"(7) You have given a tender for the purchase of the New Spg Mill, in case the purchase is sanctioned and you get possession of the Mill in pursuance of the purchase you are bound to form a Joint Stock Company; and you have agreed to give to me 1½ annas share as commission out of the amount calculated at the rate of 3 pies per pound of yarn and cloth manufactured in the Mill, treating the said amount as 16 annas; and as you have agreed to that condition, I have agreed to this partnership Therefore you should enter my name as a sharer in commission along with yours in the deed when you form a Joint Stock Company on completion of your purchase of the Mill; and you are to execute in my favour a document according to law relating thereto."

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On the same 30th July, 1915, a letter, dated the 31st July, 1915, was written by Jivanlal to the Liquidator, asking in effect that the sanction of the Court to the acceptance of his tender might be made public, a course which up to that time had apparently not been taken.

Some of the terms of this letter are difficult to reconcile with any view of this case. In the course of it the writer said, "As regards Mill properties, Mr. Mafatlal Gagalbai" (*i.e.*, the appellant), "of this city has obtained a lease from the trustees. I have, however, taken over the working from him as his partner." Jivanlal also included in the letter an offer to take a lease of the mill himself at a rent of Rs. 16,259 per annum over and above the Rs. 36,000 to be given to the trustees under the appellant's lease.

This proposal of Jivanlal to take a lease seems to have received the approval of the District Judge on the 6th August, 1915, and about the same date the temporary injunction which had been obtained by the Liquidator was dissolved. The Liquidator's suit was not proceeded with.

Having regard to the conclusion to which their Lordships feel bound to come in this case, the subsequent events do not require to be elaborately stated. It is enough to say:—

(1) That possession of the mill was not obtained from Dolatram until the 24th February, 1916.

(2) That the respondents agreed to purchase the debentures for Rs. 2,25,000 held by Motilal.

(3) That the debenture-holders did not sanction the grant of any lease to the appellant under the agreement of the 14th November, 1914, but approved the grant to one Manilal, a nominee of the respondents, of a lease on terms more favourable to the debenture-holders than the terms contained in the agreement of the 21st November, 1914.

(4) That on the 24th February, 1916, a lease upon these more favourable terms was accordingly granted by the trustees for the debenture-holders to the respondents and others.

(5) That the respondents acquired from the Bank the latter's debentures at the same price as that mentioned in the letters which had passed between the appellant and Dani, but upon terms different as to time of payment.

(6) That the respondents worked the mill under the lease until the completion of the purchase of the properties of the old Company by the new Company as next hereafter mentioned.

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(7) That the new Company was formed by the respondents to take over and took over the properties of the old Company upon the terms of Jivanlal's tender.

(8) That the respondents constituted themselves and others managers of the new Company for a term of 99 years at a commission shared in certain proportions between themselves and their co-adventurers.

(9) That the appellant was given no part in any of these transactions nor any share in the profits of working the mill under the lease or in the commission payable by the new Company.

The appellant launched the present suit on the 13th October, 1917. As already stated, he has failed in both the Courts below.

Before their Lordships' Board the appellant did not press his first claim in the suit, as no profits resulted from the working of the mill under the lease granted by the trustees.

Their Lordships are satisfied that there have been in the Courts below the following concurrent findings of fact, namely (1) that if there was any concluded agreement at all reached upon the 30th July, 1915, between the appellant and defendants, such agreement was only to operate if and when possession of the mill was given to the appellant under his agreement for a lease of the 21st November, 1914, and (2) that this condition precedent to the operation of such agreement, if any, was not fulfilled.

Their Lordships are further satisfied that there was evidence upon which these findings could have been reached, and that there does not exist in the case any circumstance which would justify their Lordships in reviewing these findings having regard to the practice of their Lordships' Board, as stated by Lord Dunedin in *Robins* v. *National Trust Company, Ltd.*[2] In their Lordships' judgment the appellant's case must be dealt with on the basis of these findings and must fail.

In this aspect of the case it becomes unnecessary for their Lordships to express any opinion upon any of the other questions debated before the Board in the course of the appeal. Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Stanley Johnson & Allen.*

K.J.R. *Appeal dismissed.*

2 (1927) A.C. 515.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR JOHN WALLIS.

Satish Chandra Joardar and others .. *Appellants** (*Plffs.*)

v.

Kumar Birendra Nath Roy Bahadur .. *Respondent* (*Deft.*).

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Limitation Act (IX of 1908), Arts 142, 144—Possession—Suit for—Decree in prior suit by plaintiff against defendant declaring plaintiff's title to suit land—Suit for possession filed within 12 years of—Plaintiff's right to decree in case of—Possession—Submerged land—Possession of, during submergence—Presumption in favour of party with title as to.

The suit, which was filed in June, 1917, was for possession of a piece of land appertaining to mouza *B*, which was liable to diluvion. On 15th April, 1908, the present plaintiffs' father, claiming as patnidar under the owners of the said mouza, had instituted a suit in the same Court against the present defendants, for possession and mesne profits, alleging that, when the lands of the mouza had reformed and had become fit for cultivation and he attempted to take possession, he was obstructed by the defendants, who had taken possession in execution of a decree obtained by them in a prior suit of 1897 which they had instituted against third parties. In the suit of 1908, the High Court found that the defendants had not been shown to have been in possession of the particular piece of land, the subject-matter of the suit of 1917, and that consequently a decree for possession and mesne profits should not be passed against the defendants The High Court, accordingly, in the suit of 1908, passed a decree merely declaring the title of the plaintiff to the piece of land, the subject-matter of the suit of 1919 In their written statement filed in the suit of 1917, the defendants expressly admitted that they were in possession of the land sued for when the suit was filed.

Held that the plaintiffs, having established their title in the suit of 1908, and not being barred by limitation, were entitled to a decree.

In the case of land liable to submergence, proof by the owners thereof of "actual possession" in the sense of occupation after the submergence is not necessary, as their possession in law will continue until they are dispossessed.

Appeal No. 69 of 1928 by special leave of His Majesty in Council from a decree of the High Court, Calcutta (Cuming and Page, JJ.), dated the 5th February, 1926, reversing an appellate decree of the Court of the District Judge of Nadia, dated the 30th June, 1925, by which the decree of the Subordinate Judge of Nadia, dated the 19th January, 1924, was set aside.

The material facts of the case appear sufficiently from their Lordships' judgment. The case in the High Court is reported in 44 C.L.J. 121 and 97 I.C. 1003.

*P.C. Appeal No. 69 of 1928 — 7th June, 1929.

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Dunne, K.C. and *Talbot* for appellants.

De Gruyther, K.C. and *Parikh* for respondent.

Dunne, K.C.—The title of the appellants to the lands in question was finally declared by the judgment of the High Court, dated the 12th July, 1915. The suit was not barred by limitation, and Art. 142 of the Limitation Act had no application to the facts of the case. The previous judgment of the High Court is conclusive that there had been no dispossession of the plaintiffs earlier than 1908. The land being submerged and title being in the plaintiffs, they were in constructive possession thereof until actually dispossessed by somebody else. The *onus* was not on the plaintiffs to show their possession within 12 years of the suit. Having established their title by the prior decree, the defendants must prove their adverse possession for 12 years.

De Gruyther, K.C.—The plaintiffs having come into Court alleging dispossession, the burden of proof was on them, under Art. 142 of the Limitation Act, to prove their possession within 12 years of the date of the institution of the suit.

7th June, 1929. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The present suit relates to a triangular piece of land forming the southern portion of the mouza Bhairabpara, a small permanently settled estate consisting of a long narrow strip of land, liable to diluvion by the river Padma on the north and by the river Gorai on the south. At times the whole mouza has been completely submerged, and when above water would appear to have been the subject of incessant litigation.

About the year 1882 it was totally submerged, and when it reformed and became fit for cultivation, the Tagores, who are the owners of an adjoining estate, entered upon it. Thereupon the present defendants, the Natores, who own another adjoining estate, instituted a suit, No. 127 of 1897, in the Court of the Subordinate Judge of Nadia against the Tagores, claiming that the lands on which the Tagores had entered belonged to their own mouza of Keshapore or Bhairabpara. For the purposes of that suit a map was prepared by a Commissioner, Mr. J. N. Roy, which showed that in 1898, at the date of the report, the river Gorai had moved northward and then ran through the mouza of Bhairabpara, thus separating the southern portion, which is the subject of the present siut, from the rest of the mouza.

In that suit the Subordinate Judge held that the plaintiffs had proved their title, but that the suit was barred except as to 350 bighas.

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On appeal the District Judge, whose decree was affirmed by the High Court on second appeal, held that the defendant Tagores had no title, that the plaintiffs had shown that Bhairabpara was identified with their mouza of Keshapore, and, even if it were not, they had acquired a title by adverse possession through their *jotedars* or tenants. He accordingly gave the plaintiffs a decree for possession and mesne profits.

In the execution of this decree the Natores, the present defendants, were put in possession on the 26th June, 1905. They were also awarded mesne profits on the estimated cultivable lands in the mouza in accordance with the report of a Commissioner, which was duly confirmed by the Court.

On the 15th April, 1908, the present plaintiffs' father, claiming as patnidar under the Mozumdars, another family who, he alleged, were the owners of the mouza of Bhairabpara, instituted suit No. 308 of 1908 in the same Court against the Natores, the present defendants, for possession and mesne profits, alleging that, when the lands of the mouza had reformed and had become fit for cultivation and he attempted to take possession, he was obstructed by the defendants, who had taken possession in execution of their decree against the Tagores in the suit already mentioned.

The Subordinate Judge held that the plaintiff had proved his title, but that he was barred as to 600 bighas, forming the northern portion of the mouza, the defendants having acquired a title by adverse possession for twelve years before the last submergence of the mouza.

The defendants appealed, and the plaintiff filed cross-objections, and, while the appeal was pending, the plaintiff died, and his sons and legal representatives, who are the plaintiffs in the present case, were substituted for him.

On appeal the learned Judges of the High Court were of opinion that it was impossible to locate the 600 bighas, which the Subordinate Judge had held to have been in possession of a factory holding under the defendants. They came to the conclusion, however—it is said, for the respondents, quite wrongly—that the defendants in their 1897 suit against the Tagores had not claimed the southern triangle of Bhairabpara, which the learned Judges said was then in the bed of the river Gorai, and hence they concluded that the factory holding under the defendants had been in possession of the whole of Bhairabpara *minus* the small southern triangle, and they accordingly held the suit to be barred except as to the southern triangle.

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On the footing that the defendants in their 1897 suit had neither asked for nor obtained possession of the southern triangle, they found that the defendants had not been shown to have been in possession of it, and that consequently a decree for possession and mesne profits should not be passed against them, but that the plaintiffs should have a declaration of their title to the southern triangle.

It will, however, be better to state their conclusions in their own language, as so much has turned on it in the present suit.

"The defendants in their Title Suit against the Tagores in 1897 claimed the lands north of the then current Gorai river as their Kishorepur lands. They did not claim the triangular portion of Bhairabpara, which was then in the bed of the Gorai The defendant got a decree accordingly, and we do not think that there is any satisfactory evidence definitely pointing to the possession of this triangular portion when it reformed after northward progress of the Gorai; in fact, it was not claimed in the Title Suit of 1897. We think, therefore, that the decree in favour of the plaintiff must be confined to the triangular portion of Mouza Bhairabpara to the south of the northern bank of the Gorai river, as shown in the map of J. N. Roy. The defendants retain the entire fruits of their decree against the Tagores. The present suit was brought expressly for the lands which the defendants obtained in execution of their decree against the Tagores There was no allegation of dispossession in respect of any other lands, but the triangular portion was shown as disputed to the Commissioner. The defendants in their written statement generally stated that Mouza Bhairabpara was the name fraudulently given to their Mouza Kishorepur and they also relied upon their decree against the Tagores as the basis of their possession. The decree, therefore, will be for a declaration of the rights of the plaintiff as Patnidar to that portion of Bhairabpara which is south of the northern bank of the Gorai, as shown in the map of J N Roy. The suit for recovery of possession of the lands decreed to the defendants in their Title Suit No 125 of 1897 is dismissed As the defendants, however, denied the title of the plaintiff to the portion in respect of which he gets a declaration, the plaintiff will be entitled to his costs in proportion to the area."

The plaint in that suit had claimed a declaration of title and a decree for possession and mesne profits of the mouza of Bhairabpara, and the judgment is to be read as finding, not that the southern triangle was not the subject of the suit in which case no declaration about it could have been given, but that the plaintiffs had only been dispossessed of the lands north of the Gorai as shown in the map made by J. N. Roy in 1898.

It would have been well if both parties had been content to accept this adjudication of their rights. Unfortunately, this judgment was the starting-point of fresh and protracted litigation. The plaintiffs were resisted by the defendants when they attempted to take possession, and having made futile attempts to get possession in execution, a relief not given by the decree, and to amend the decree, which was in strict accordance with

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the judgment, on the 23rd June, 1917, they filed the present suit for possession of the southern triangle, which, after having been twice before the Subordinate Judge, the District Judge, and the High Court, has now come before this Board from the decree of the High Court dismissing the suit.

In the plaint in the present suit the plaintiffs ignored the fact that the High Court in the previous suit had refused to give them a decree for possession and mesne profits in respect of the southern triangle, and alleged in paragraph 5 that the High Court had held that the defendants had wrongfully taken possession of the southern triangle on 12th Assar, 1312 (the 26th June, 1905), in execution of their decree in the 1897 suit against the Tagores. They did, however, allege in paragraph 7 that, in consequence of the establishment of their right to the southern triangle in the previous suit, they were entitled to maintain a suit for possession and mesne profits, and in paragraph 8 they stated their causes of action as having arisen on the 12th Assar, 1312 (26th June, 1905), when the defendants took wrongful possession, and on the 8th May, 1917, when their execution petition in the previous suit for possession of the southern triangle was dismissed.

The case first came before the Subordinate Judge, who dismissed the suit, holding, with reference to the fifth issue, that it was barred under section 11, Explanation V, of the Code of Civil Procedure, on the ground that possession had been asked for and refused in the previous suit.

On appeal the District Judge set aside the decree of the Subordinate Judge and remanded the suit for trial on the remaining issues, and his decree was upheld by the High Court on second appeal. Richardson, J, who delivered the judgment of the High Court, observed that the plaintiffs had not framed their plaint artistically, as they had not contented themselves with a new cause of action based on the decree of the High Court in the suit of 1908, but had alleged dispossession in the year 1905, and had included this alleged dispossession anterior to that suit as part of the cause of action in the present suit. He then proceeded to deal with the judgment of the High Court as follows:—

"If, then, the judgment of the learned Judges is referred to, it is obvious that the learned Judges did not decide that if the plaintiff was not in possession, he was not entitled to possession. The learned Judges put their own construction on the pleadings and they formed their own conclusions as to the facts It appears to me that the parties to the present suit are as much bound by the learned Judges' construction of the pleadings and conclusions of fact as they are by the decree itself. Whether they were

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right or wrong is now immaterial. The decree follows from the reasons given for it, whether they were right or wrong, and must be understood and interpreted in the light of those reasons. The judgment, standing as it does, the parties are governed by it and are estopped from making averments which would be contrary to the record.

"The plaintiffs' true cause of action in the present case is the High Court decree of 1908, coupled with the fact that they are out of possession. Allegations in the plaint which go beyond this cause of action may be regarded as surplusage."

In spite of this clear pronouncement the Subordinate Judge, when the case went back to him on remand, held that the suit was barred under Art. 142, as the defendants and the Tagores before them had been in continuous possession for more than twelve years before the institution of the present suit in June, 1917, thus ignoring the finding of the High Court in the previous suit that neither the Tagores nor the defendants had been in possession before June, 1908, when that suit was filed.

On appeal the District Judge applied Art. 144 instead of Art. 142. Treating the question as one of adverse possession under Art. 144, he held that the defendants were not entitled to tack on the Tagores' possession to their own for the purposes of the article. In the result he allowed the appeal and decreed the suit.

The case then went to the High Court on second appeal, when Cuming, J., agreed with the Subordinate Judge that the suit was barred under Art. 142 and should be dismissed. Page, J., concurred in allowing the appeal and dismissing the suit, but on different grounds. After referring to the judgment of the High Court in the previous suit and to the judgment of Richardson, J., in this suit, he observed:

"Now the matter stands thus: the plaintiffs have been declared entitled to the triangular portion in dispute; but up to 1908, the date of the Title Suit brought by the plaintiffs against the Natores, it must be taken that there is no evidence, upon which the Court can rely, to justify a finding that the defendant-respondent, the Natores, or anybody else, were in actual possession of this 155 bighas."

It was unnecessary for the plaintiffs to prove "actual possession" in the sense of occupation after the submergence, as their possession in law continued until they were dispossessed. In the opinion of their Lordships, as already stated, the finding on which the judgment of the High Court in the previous suit was based was that there was no such dispossession prior to the 15th April, 1908, when that suit was filed. Whether that finding was right or wrong, it is *res judicata* and the defendants are estopped from questioning it, and it necessarily follows that the present suit which was filed within twelve years was in time.

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Page, J., was apparently of opinion that the suit was not barred, but he held it must be dismissed as there was no evidence that the defendants had taken possession between 1908, the date of the earlier suit, and 1917, the date of the present suit. No such evidence was needed, as it was common ground and expressly admitted in the written statement that the defendants were in possession in June, 1917, when the present suit was filed. This being so, the plaintiffs, having established their title in the previous suit, and not being barred by limitation, are entitled to a decree.

Further, even if the defendants could be heard to say that the plaintiffs were dispossessed by them for 11 years, 11 months and 27 days from the 26th June, 1905, down to the institution of the present suit, their Lordships are of opinion that there is no evidence to support the finding of the Subordinate Judge, which the District Judge, apparently accepted, that prior to the 26th June, 1905, the Tagores were in possession of the southern triangle. It is no doubt the case that the defendants recovered mesne profits in their suit of 1897 against the Tagores in respect of a tract of land which included the southern triangle, but the report of the Commissioner was based on the finding that the lands in question had again become culturable after the diluvion, and not on the ground that they had been actually cultivated The Commissioner's report on which the learned Judge relied is not evidence of dispossession by the Tagores, and their Lordships have not been referred to any other evidence in support of such a finding. It must therefore be held that it is not shown that the plaintiffs were dispossessed by the Tagores prior to June 23, 1905, and, indeed, it was held in the suit of 1908 that the Tagores had never been in possession of the southern triangle. On this ground also the suit must be held not to be barred.

For these reasons their Lordships are of opinion that the appeal should be allowed, the decree of the High Court reversed, and the decree of the District Judge restored, with costs throughout, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *W. W. Box & Co.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

R. Rathnasabapathy Chettiar .. *Appellant** (*Plff.*)

v.

Ammakannammal and others .. *Respondents* (*Defts.*).

Rathnasabapathy Chettiar v. Ammakannammal.

Pleadings—Fraud—Breach of trust—Pleas of—Particulars—Specification of—Necessity—Issues—Settlement of—Object of—Precision in regard to—Necessity—Trustees under trust deed—Misfeasance by—Plea of—Onus of proof in case of—Evidence—Birth—Date of—Transfer Certificate giving date of birth as per Admission Register—Admissibility in evidence of.

Where the administration of trustees appointed under a deed of trust is attacked in any respect, the *onus* is on those who attack the administration to show that the trustees committed misfeasance in the respect alleged.

Held, that a copy of a Transfer Certificate purporting to have been given when the 1st plaintiff left a particular school, and containing an early "date of birth as per Admission Register, 7th April, 1905," even if it was a correct copy coming from proper custody, was not evidence on the point of the date of birth of the 1st plaintiff because it was only a copy of a copy. It is the Admission Register alone which would be evidence of the date of birth.

Per The Chief Justice—Any charge involving anything of the nature of fraud should be set out specifically with particulars where necessary. Where there are allegations of fraud and breaches of trust, those matters ought to be particularised to a point at which the litigant knows not merely generally but in detail what he has to meet.

Observations on the drafting of pleadings and settlement of issues.

On appeal from the judgment of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 25th November, 1927, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 595 of 1925.

K. S. Krishnaswami Aiyangar for appellant.

T. N. C. Srinivasavaradachariar, A. Ramaswami Aiyar, M. S. Venkatarama Aiyar, E. V. Sundara Reddi and *T. L. Venkatarama Aiyar* for respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—I have had the advantage of reading the judgment prepared by my learned brother in this case and I entirely agree in the result. I only desire to say one thing in this connection. There seems to me to be a grave defect in the method of pleading and still more in the method of drawing up the issues which appears to be finding favour in these Courts. It is a settled rule of English pleading that any charge involving anything of the nature of fraud should be set out specifically with particulars where necessary. For instance, if breaches of trust are alleged on the part of a

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trustee it is essential that they shall be particularised in precise detail such as sums of money or other items of trust property alleged to have been misappropriated. Besides that safeguard we have the system in this country of having issues settled before the trial which is supposed to extract from the pleadings the matters which are really in dispute between the parties and to reduce them to a series of short propositions. That is not part of the English system. It is inherited from the Scottish system of jurisprudence. Not being familiar with that system I can express no opinion as to its merits or demerits in the country of its birth. But I do know this in a general way that a Scottish Judge who is settling issues treats it as a very serious matter and reduces his issues to a high degree of precision and exactitude even when full pleadings are demanded. In India I am afraid the system of settling issues is so perfunctory that the issues are really worse than useless as a guidance to the Trial Judge. That, at any rate, was in the main my experience during the eight years in which I sat day by day on the Original Side. Sometimes the issues were vitiated by the fact that when one got into the case it was quite obvious that they put the *onus* on the wrong party; sometimes they were so vague as to be a less guide to what really was to be tried even than the pleadings. I could not take a better example than the seventh issue settled in this case which runs as follows:

"Have the trustees been guilty of any, and, if so, what breaches of trust, misfeasance, malfeasance and non-feasance in respect of the trust estate?"

That opens the door to allow the defendants to bring any sort of charge at the trial, unspecified and unparticularised, and gives the plaintiff whose conduct is impugned, no sort of notion what charge and how many charges, all obviously of a very grave nature, he has to meet. I remember asking a very experienced and eminent County Court Judge in England whether he did not find difficulty from the absence of regular pleadings in the County Courts such as one would find in the High Court. He said:

"No. I find that the parties know perfectly well what they have come to have decided and at the time their case is opened their advocates know exactly what matters to direct my attention to"

Whether that be correct or not, of course I am not in a position to say; but of this, I am quite certain that, if one is to act on that principle not only issues but pleadings may just as well be abolished to-morrow. That, I think, is not right especially in India because I think the litigant ought to know at any rate in general terms what case he has got to meet, and especially in

cases where there are allegations of fraud and breaches of trust. I think that those matters ought to be particularised to a point at which he knows not merely generally but in detail what he has to meet. I would personally suggest that issues settled as they are now settled by a Judge who knows nothing about the case and usually signs the issues drafted by counsel who know little more are worse than useless and have a fictitious importance which they do not deserve. I would far sooner see attempts made by better instruction in the Law College and above all in the Chambers where the budding practitioner learns his business in the art of pleading with sufficient definiteness to make it clear exactly what the Court is called upon to try. In every jury trial in England a junior counsel for the plaintiff before the case is opened summarises the pleadings giving the substance of them and concludes in these words: "On that issue is joined and those are the issues which you have to try;" and a good junior will make it clear to the jury what exactly the issues are raised by the pleadings and takes a good deal of trouble to see that his summary is correct and omits nothing material. But, of course, with the laxity of pleadings which obtains in this country it is very difficult, it is almost impossible that the issues settled on those pleadings should not partake of the same laxity. The remedy appears to me to teach the budding practitioner to plead properly and definitely. It should not be difficult to teach a young man how to plead. There is a very good work by Dr. Blake Odgers in England and for the student it is not really necessary to go to the larger work by Bullen and Leake except for proper forms of pleading particular classes of cases. Two books on pleading have appeared in this country, one by Sir Cecil Walsh, K.C., who recently retired from the Allahabad High Court, and the other a bigger book which I looked through at the time but the name of the author of which I regret to say I have forgotten. Of course, at one time English pleadings were overlaid with technicalities and plaintiffs were often non-suited for some purely technical slip in the pleading and had to amend it and start all over again, all that after witnesses have been summoned, briefs delivered and everything was ready for trial. That state of things was put an end to by the Judicature Acts and I think the present state of pleading in England, though it leaves room for making it quite easy to distinguish between the work of a neat and slipshod pleader, really does enable the Judge to know exactly what the points at issue between the parties are. If a pleading is

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vague and leaves it obscure as to what precisely is the case intended to be set up, it is quite easy for the opposite party to take out summons for further and better particulars of this or the other paragraph of the statement of claim or defence and hundreds of such summonses are disposed of after hearing counsel by the Masters every day in Chambers. It is the rarest thing in the world to have applications for particulars of allegations in pleadings in an Indian Court. I think that what happens is that the juniors in charge of the cases trust to the settlement of issues to bring definiteness into the case, a hope in which in my experience they have often been grievously disappointed and of course at that stage the leaders probably would not even have considered the case at all which may not come up for trial for months. Most Indian pleadings are overlaid with pleading the evidence in support of the particular facts alleged. That is useless cumbering of them but as a rule it does not do much harm. But in cases where there are allegations of fraud or kindred allegations more particulars are absolutely essential and I should like to see the Indian student and the young budding advocate put through a real course of proper instruction in the art of pleading. That would bear fruit in time if it is properly carried out. And I think it must be taught in the first instance by English professors or English barristers who worked under and know the English system. I am not gainsaying that in the hands of experienced advocates at the trial the opening of the case of the parties gets rid of a lot of verbiage and focusses the attention of the Court on what is really material and really necessary. But in my opinion it is almost impossible to gather it from the issues even with the assistance of the pleadings which I must honestly confess I think are less loose and vague in their terms than the majority of issues framed to-day. The Indian system of pleading we have adopted is of course taken from the English system of jurisprudence just as the framing of the issues is taken from the Scottish system as I have pointed out; but unfortunately particularity and preciseness which are characteristic of all the very ably drawn English pleadings are entirely absent from Indian pleadings for the most part. There are no doubt some well-drawn pleadings in India but almost invariably these are very often cases in which a summons has been taken out by the opposite party to compel the pleader on the other side to re-draft his pleadings in a more specific form. I think it would be well worth while to have a committee of legal teachers and a few practitioners to go into this matter and consider what

suggestions could be fruitfully made to bring about a better state of things. I think the present is a case in which vague pleadings and vague issues might have led to serious embarrassment or even to a miscarriage of justice.

Pakenham Walsh, J.—This is an appeal by the 1st plaintiff against two parts of the decree in C.S No. 595 of 1925. The suit arose in the following circumstance: The appellant is the adopted son of one Ratnavelu Chetti who was a Dubash in Best & Co. This Ratnavelu Chetti was a wealthy gentleman and on the 18th May, 1919, he executed a deed of trust setting apart certain moveable and immoveable properties for certain charities and for allowances to some of his relations. Effect was given to the deed of trust from July, 1919 and the founder died in February, 1922. His adopted son, the appellant, succeeded his father as President of the Trust Board. Owing to the fall in value of the trust properties, the trustees found themselves unable to meet the sums payable under the trust deed from the income of the trust properties. They passed a resolution in March, 1923, to cut down the allowances proportionately all round. This being objected to by some of the beneficiaries, an application was made on the Original Side asking for directions for the abatement of the provisions contained in the trust deed. Waller, J., ordered that a suit should be filed and consequently this suit was filed by the trustees. The materially contesting defendants were defendants 11, 12 and 18. Of these the 11th defendant is the sister's son of the founder of the trust. He is really responsible for any serious opposition to the suit scheme but he has not appeared in this Court to oppose the appeal. A Commissioner was appointed by the Court to go into the accounts and submit his report. His first report was dated the 15th March, 1927 and a further report was called for to take accounts as to what a building known as "Kilton" cost for construction and how much of the total cost had been taken out of the trust funds. We are not concerned in this appeal with the matter of "Kilton" The decree states in paragraph 2 that the Commissioner's two reports be and are hereby confirmed, but with regard to the two matters on which this appeal is preferred and which are dealt with in paragraphs 4 and 5 of the decree, the Commissioner gives no decision on the first and on the second his report does not support the order passed in the decree.

The first is a matter of payment of Rs. 3,150 to the 1st plaintiff between February, 1922 and April, 1923. According

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to the deed of trust, during the minority of the 1st plaintiff the sum of Rs 350 per mensem was to be paid to the wife of the founder which to be for her own maintenance and that of the first plaintiff and for the education of the latter. After the first plaintiff attained majority, the founder's widow was to get Rs. 250 per mensem and the 1st plaintiff Rs. 350 per mensem. The 11th defendant objected that the 1st plaintiff did not attain his majority until the 7th April, 1923, whereas the trustees had been paying him at the rate of Rs. 350 per mensem from February, 1922 to April, 1923, as if he had attained majority. The 11th defendant, who, as stated above, has been the person really raising objections to the suit, made no clear statement on the point in his written statement. He merely states in paragraph 10 that the allegations in paragraph 9 of the plaint are not quite correct. Paragraph 9 of the plaint states that, after the death of the founder, expenditure was considerably increased by the founder's wife and his adopted son becoming entitled to the monthly allowances of Rs. 250 and Rs. 350 respectively. All that the 11th defendant does in paragraph 10 of his written statement is to recapitulate the exact terms of the trust deed. He does not state definitely that the 1st plaintiff had not attained majority or at what age he actually did attain majority. In the written statement filed by the 12th and 18th defendants, there is a definite statement that the 1st plaintiff became entitled to a monthly allowance of Rs. 350 only on the 7th April, 1923, when he attained majority. There was no specific issue framed on the point and the only issue by which this matter can be said to be covered is the general issue No. 7:

"Have the trustees been guilty of any, and, if so, what breaches of trust, misfeasance, malfeasance and non-feasance in respect of the trust estate?"

The matters that were referred to the Commissioner were to take the following accounts, namely, (*a*) an account of the properties of the trust estate, and, (*b*) an account of the income that the said properties will fetch if proper and reasonable care is exercised. Before the Commissioner, the 11th defendant led evidence as to the minority of the 1st plaintiff. The 1st plaintiff's advocate seems very properly to have objected on the ground that it was not a question referred to the Commissioner. The Commissioner, (while he took some evidence), probably in view of the fact that he was not asked to report on this matter, merely states:

"If the Honourable Court accepts the defendants' contentions, the receipt of this item of money by the 1st plaintift would be unauthorised."

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No evidence was led on the matter before the learned Judge whose only reference to it in the judgment is as follows:—

"The next question is as regards the sum of Rs 3,150 which was collected by the trustees after the death of Ratnavelu Chetti and taken by the 1st plaintiff in his personal capacity as and for his allowance So far as this is concerned, it is clear that he was not entitled to any allowance until he attained majority. The 1st plaintiff has not shown how he was entitled to this allowance. He will therefore bring back Rs. 3,150."

In our opinion, the learned Judge has thrown the *onus* on the wrong side in this matter. It was for those who attacked the administration of the trustees to show that they had committed misfeasance in this respect. As noted above, the question was not one referred to the Commissioner and objection was taken by the 1st plaintiff to his enquiring into it. The Commissioner gave no opinion on the matter and as no evidence on it was led before the learned Judge, there is properly speaking no evidence on the point and therefore the alleged misfeasance has not been proved. The learned advocate for the appellant has, however, taken us through the evidence adduced on the point before the Commissioner and in our opinion the evidence on the 1st plaintiff's side is much superior to that adduced by the 11th defendant. The 11th defendant was the only witness examined to prove that the 1st plaintiff was not a major when his adoptive father died. Now the 1st plaintiff's adoptive father together with the 11th defendant had filed a suit in 1922 of which the plaint is Exhibit H. The date of the plaint is unfortunately not given in the printed portion extracted and the date put in the index, 15th July, 1917, is obviously wrong for the suit was only one of 1922 In Exhibit H the present 1st plaintiff was the 5th defendant and while, in the case of other defendants who were minors, the fact is distinctly stated and their guardian named, the present 1st plaintiff is not described by his adoptive father, (the 1st plaintiff in that suit), or by the present 11th defendant, (the 2nd plaintiff in that suit), as a minor. This suit was, as regards his adopted son, a formal one by Ratnavelu and it is not alleged that there was any adverse interest between the plaintiffs in that suit and the present 1st plaintiff. When the 11th defendant was cross-examined on this point before the Commissioner, he had no explanation to give and said he did not know whether the averment in the plaint was right or wrong and that he signed it because Ratnavelu Chetti asked him to sign it. On the other side, the 11th defendant relied on Exhibit IV. This purports to be a copy of a Transfer Certificate given when the 1st plaintiff left the Lutheran Mission

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Secondary School at Purasawalkam and the entry relied on in it is "date of birth as per Admission Register, 7th April, 1905." In the first place, the document itself has not been properly proved. It is professedly a copy of the Transfer Certificate. The 11th defendant, as D.W. 1 says, he did not get it from the Headmaster but from the 7th defendant. The latter is not called nor is the Headmaster called. Even if Exhibit IV be accepted as a correct copy coming from proper custody, it would not be evidence on the point of date of birth because it is a copy of a copy. It is the Admission Register alone which would be evidence of the date of birth. As a matter of fact, Exhibit IV possesses very suspicious features. We find in it purporting to be part of the document "No. 61 of 1922-23." These certificates have got to be given at the time the boy leaves the school for another school. How this number 61 of 1922-23 could appear on a certificate that the boy left on 30th April, 1915 has not been explained. Another suspicious feature is that the pupil's name is given there as R. Rathnasabapathy. The 1st plaintiff had admittedly not been adopted at the time he left the school. His name was then Manickam, and his initial should have been "M." and it was only after his adoption that he would get the initial "R." of his adoptive father Ratnavelu. The 11th defendant filed Exhibit II alleged to be a copy of a will executed by Ratnavelu Chetti on the 3rd February, 1922, in which the 1st plaintiff is described as a minor. Notice was served on the plaintiff's vakil for the production of this will before the Commissioner but he refused to produce it on two grounds: (1) as noted above that this matter of the 1st plaintiff's majority was not referred for enquiry to the Commissioner, and (2) that the pleader did not represent the 1st plaintiff in his personal capacity but as a trustee. This is all the evidence about 1st plaintiff's minority. Not only was there no specific issue raised on the point but, assuming that such an issue was raised, the *onus* has been thrown on the wrong party. From a strictly legal point of view, there is no evidence at all and so the contention of 1st plaintiff's minority fails. Even if the evidence tendered before the Commissioner be taken into account the evidence afforded by Exhibit H is much better than that of Exhibit IV which is really not admissible at all and Exhibit H is certainly as good evidence as Exhibit II. We therefore find that the 1st plaintiff is not liable to restore the sum of Rs. 3,150.

As regards the second matter appealed against, this is dealt with in paragraph 5 of the decree. It concerns a sum of

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Rs. 10,713-8-0 expended for the repairs of the property known as "Rathna Villa," which the appellant has been ordered to restore. As stated by the learned Judge, the trustees met and refused to allow a claim which the 1st plaintiff had made with regard to this expenditure, *vide* Ex. Z. The learned Judge then proceeds:

> "The further question however arises as to whether this sum of Rs 10,713-8-0 which is now in dispute and which was claimed as having been spent for repairs was money taken out of the trust funds or money taken out of the private funds of Rathnavelu Chetti. On this part of the case the *onus* is on the 1st plaintiff, who claims this sum, to show that it was taken out of the private funds of Rathnavelu Chetti. It finds an entry in Exhibit G-1 which is the trust account book. I am not satisfied on the evidence before me that it has been proved that this amount which finds a place in Exhibit G-1 was really spent out of the private funds of Rathnavelu Chetti."

The accounts, however, filed and exhibited prove clearly that the expenditure must have been out of the private funds. The Commissioner's report contains nothing to the contrary and the only reference in the report itself to this sum is where it is merely quoted as a criterion for what would be reasonable expenditure on repairs and whitewashing of buildings. Turning to the accounts, Exhibit AA shows that the total receipts of the trust fund were Rs. 78,473-0-10 and the total expenditure was Rs. 1,10,378-6-8. Of this, the trustees disallowed a sum of Rs. 10,713-13-8 on account of improvements to "Rathna Villa" thus reducing the net expenditure to Rs. 99,664-9-0. Deducting from this the amount collected Rs. 78,473-0-10, the balance due to the founder's estate is Rs. 21,191-8-2. These are the accounts which the Commissioner has found correct. It is obvious therefore that this amount of Rs. 10,713-13-8 which the 1st plaintiff spent for the repairs to "Rathna Villa" must have been taken out of the private estate of Ratnavelu Chetti, because even after disallowing it from the expenditure, there was still a sum of Rs. 20,000 and odd due to the estate. In other words, 1st plaintiff could not possibly have got the money out of the trust. He therefore is clearly not bound to make it good. The appeal must be allowed on this point also.

In the result, the appeal is allowed throughout. The costs will be as follows: The costs of respondents 25 and 26 to come out of the Trust Estate (Rs. 425). The 11th respondent to pay Rs. 350 as and for the costs of the appellant and the balance of the taxed costs to be recovered by the appellant from the Trust Estate. The respondent or each set of respondents who have appeared by their advocates other than the 11th respondent to be paid Rs. 50 each out of the Trust Estate.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Auto Supply Co., Ltd. .. *Appellants** (*Plffs.*)

v.

V. Raghunatha Chetty .. *Respondent* (*Deft.*).

The Auto Supply Co., Ltd. *v.* Raghunatha Chetty.

Hire purchase agreement—Agreement amounting to a—Motor bus—Agreement as regards—Provision in, for initial payment of heavy sum on delivery of bus and for monthly instalment payments by way of hire—Termination of agreement by owner on default in payment of monthly instalments—Provision also for—Termination of agreement by owner pursuant to—Initial payment—Amount representing—Forfeiture of—Owner's right to retain amount

By an agreement, dated 12th September, 1927, the plaintiffs delivered a motor bus of which they were the owners to the 1st defendant who hired it under the terms of the agreement. By clause (3) of the agreement the hirer was to pay by way of hire without demand a sum of Rs 1,140 on delivery, and thereafter a sum of Rs. 226 on the 12th day of every month beginning with the month next after the date of the agreement until 11 monthly instalments had been made unless in the interim he should have terminated the agreement By clause (4), in the event of all the stipulated monthly hire being duly and punctually paid, the vehicle was at the hirer's option to become his absolute property, but he had a further option to buy the vehicle outright at any time during the currency of the agreement by paying all the hire up to date By clause (2) the hirer was to pay the owners a sum of Re 1 as consideration for the option to purchase given to him. It was also provided that the owners might terminate the contract of hiring and forthwith recover possession of the vehicle in certain events, one of which was that the hire for any given month was in arrear and left unpaid for seven days after the date fixed for its payment [cl. (4) (*a*)].

The 1st defendant committed default in the payment of the monthly instalments due for the months of March, April, May and June, 1928, with the result that on 12th June, 1928, there was due by the defendant to the plaintiffs a sum of Rs. 904. On 30th June, 1928, the plaintiff company exercised its right under the agreement and terminated the hiring and called upon the defendant to deliver the motor bus to the plaintiff and to pay the arrears due. The defendant not having done so, the plaintiff filed a suit for possession of the motor-bus, or, in lieu of it, Rs. 2,500 its value at date of suit, for the arrears of hire Rs. 904, and for damages for wrongful detention.

Held, affirming the Trial Judge, that the agreement was a hire purchase agreement and not a sale which passed the property in the bus to the hirer with stipulated retardation of payment of the purchase price by monthly instalments

Held further, reversing the Trial Judge, that the defendant was not entitled to credit for Rs 914, being the balance of the sum of Rs. 1,140 paid by him to the plaintiffs in September, 1927, left after deducting Rs 226 due by the defendant as for hire for the first month, and that the plaintiffs were entitled to retain the said sum

Per The Chief Justice—There is, no doubt, no express provision in the agreement that, when the agreement is terminated by the choice of the hirer or by his default, all sums paid by him up to date are to be retained by the owners without giving credit to him for a farthing But it is a

*O.S.A. No. 1 of 1929. 15th March, 1929.

necessary implication of this agreement that such sums should be irrecoverable by the hirer. The initial payment of Rs. 1,140 was made a heavy one with the express purpose of acting as a deterrent to hirers throwing back road-depreciated cars on the hands of the owners within a few months of the commencement of the hiring.

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Per Anantakrishna Aiyar, J.—The sum of Rs 1,140 is to be treated as the first instalment of rent fixed by the parties to be paid by the defendant for the use of the bus (the amount of the subsequent instalments being fixed having regard to the amount fixed as the first or initial instalment). But whether the sum of Rs. 1,140 is so treated or whether it is taken as "premium" paid to the lessor by the lessee for the grant of the lease, in either view the defendant who broke the contract is not entitled to the return of the same.

On appeal from the judgment of the Hon'ble Mr. Justice Beasley, dated 24th day of October, 1928, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 316 of 1928.

Nugent Grant instructed by *S. Rajamanickam* for appellants.

G. Krishnaswami Aiyar for respondent.

The Court delivered the following

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JUDGMENTS. *The Chief Justice.*—This case turns on the construction of an agreement, dated the 12th of September, 1927, which is commonly called a hire purchase agreement. By that agreement the plaintiffs, the Auto Supply Co., Ltd., delivered a Morris motor bus of which they were the owners to the 1st defendant who hired it under the terms of the agreement. Those terms were these:

By clause (3) the hirer was to pay by way of hire without demand a sum of Rs. 1,140 on delivery, and thereafter a sum of Rs. 226 on the 12th day of every month beginning with the month next after the date of the agreement until 11 monthly instalments had been made unless in the interim he should have terminated the agreement.

Then by clause (4) in the event of all the stipulated monthly hire being duly and punctually paid, the vehicle was at the hirer's option to become his absolute property, but he had a further option to buy the vehicle outright at any time during the currency of the agreement by paying all the hire due up to date. By clause (2) the hirer was to pay the owners a sum of Re. 1 as consideration for the option to purchase given to him. It was also provided that the owners might terminate the contract of hiring and forthwith recover possession of the vehicle in certain events, one of which was that the hire for any given month was in arrear and left unpaid for seven days after the date fixed for its payment [clause (4) (*a*)]. That is the event which happened. No monthly instalments were paid for March, April, May and June, 1928, the total amount due to the owners in

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respect of those months being Rs. 914. On the 30th June, 1928, the plaintiff company terminated the hire and called for delivery of the bus to them with payment of the arrears then accrued. This was not done and the plaintiffs filed the present suit for possession of the bus, or, in lieu of that for Rs. 2,500, its estimated value at the time, for the arrears of hire, *i.e.*, Rs. 904 and for damages for wrongful detention from the date of demand, *i.e.*, 30th June, 1928.

The learned Judge has held that the agreement before us was a hire purchase agreement which I take to mean that it was a hiring with an option of purchase to the hirer on the fulfilment of the stipulated conditions and was not a sale which would pass the property in the bus to the hirer with stipulated retardation of payment of the purchase price by monthly instalments. It has not been questioned by either side that the learned Judge was right in so finding and that takes us out of the ambit of the decision in *Lee* v. *Butler*[1] and the position is that which is dealt with in the leading case of *Helby* v. *Matthews*.[2] The learned Judge has decided that on the termination of the hiring the plaintiff-owners were not entitled to retain the Rs. 1,140 paid as an advance under the agreement but only to Rs. 226 corresponding to the ordinary monthly instalments for the balance of the duration of the hiring. This seems to me to be adding a term to the contract which is not there. No doubt it was in the contemplation of the draftsman of the agreement that the sum of Rs. 1,140 was something more than what is described as being, namely, the first month's hire, and that for the protection of both parties. Every one knows that a new motor vehicle after it has been on the road for even a month is depreciated in the market by something like 50 per cent. and I make no doubt but that the object of this clause is to prevent the hirer turning a new into a second-hand car, depreciate it 50 per cent. and then put it on the hands of the owners in that condition. It is quite true that there is no express clause in this contract that on the termination of the agreement either by return of the vehicle by the hirer or by breach of the conditions of the agreement by him he shall forfeit all he has already paid including the initial sum of Rs. 1,140; but it appears to me that it is a necessary implication of the contract and I so hold. The learned Judge thinks that this is a case of hardship for the defendant, the hirer. Were this decision to be upheld, it seems to me that it would be an intolerable hardship on the owners. They hand over a new

1. (1893) 2 Q.B. 318. 2. (1895) A.C. 471.

car, it can be thrown back on their hands at the end of a month on payment of the small sum of Rs. 226 leaving in their hands a car depreciated 50 per cent. in its value. Indeed, if the sum of Rs. 1,140 is not to be treated as hire at all, I do not see why it should not be open to the hirer to return the car one day before the end of the first month and have had a month less one day to use the car for nothing. It is quite true as I have already said that there is no express provision in this agreement that, when the agreement is terminated by the choice of the hirer or by his default, all sums paid by him up to date are to be retained by the owners without giving credit to him for a farthing. But it seems to me that it is a necessary implication of this agreement that such sums should be irrecoverable by the hirer and that we should not be justified in treating the initial payment of Rs. 1,140, as in any event returnable to him on the termination of the hiring. There is no question here of any misleading of the hirer; he signed the agreement with his eyes open and in many ways it was an exceedingly favourable agreement to him, in that he could at his own choice put an end to the hiring whenever he was so minded. But I think it must be a necessary implication that he was not entitled to get back anything which he had paid under the terms of the agreement. I have no doubt that the initial payment was made a heavy one with the express purpose of acting as a deterrent to hirers throwing back road-depreciated cars on the hands of the owners within a few months of the commencement of the hiring. On the best view I can form of this case I feel constrained to differ from the conclusion of the learned Judge and to allow this appeal with costs.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—As I have the misfortune to differ from the learned Trial Judge in this case, and as the case raises a question of importance relating to the incidents of hire purchase agreement, I feel bound to express in my own words the reasons for my decision. The plaintiff in the original suit, Auto Supply Co., Ltd., is the appellant before us. In pursuance of an agreement, dated the 12th of September, 1927, the plaintiff delivered a Morris motor bus to the first defendant (the second defendant stood as surety for the first defendant). Under the terms and conditions contained in the said agreement, the first defendant paid a sum of Re. 1 in consideration of the option to purchase given to him under clause (2) of the agreement; and under clause (3) he paid in September, 1927, a sum of Rs. 1,140 to the plaintiff; he also paid to the plaintiff by way of hire Rs. 226 in each of the months after September, 1927. The first defend-

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ant committed default in the payment of the monthly instalments due for the months of March, April, May and June, 1928; *i.e.*, on the 12th of June, 1928, there was due by the defendant to the plaintiff a sum of Rs. 904. On the 30th of June, 1928, the plaintiff company exercised its right under the agreement and terminated the hiring and called upon the defendant to deliver the motor bus to the plaintiff and to pay the arrears due. The defendant not having done so, the plaintiff filed the suit for possession of the motor bus, or in lieu of it Rs. 2,500 its present value, for the arrears of hire Rs. 904 and also for damages for wrongful detention from the 1st of July, 1928, until delivery of the bus to the plaintiff. The learned Judge decreed the suit in plaintiff's favour, but held that out of Rs. 1,140 paid by the defendant to the plaintiff in September, 1927, the plaintiff was entitled to retain only Rs. 226 as for hire for the first month and that credit must be given by the plaintiff to the defendant for the balance (Rs. 1,140 *minus* Rs. 226 or Rs. 914). It is against this portion of the decision of the learned Judge that the plaintiff company has preferred this appeal.

The first question to be considered is, what is the exact legal nature of the agreement between the parties. It is necessary to distinguish between (1) contracts to buy and pay by instalments; and (2) contracts to hire, the hirer having an option to return goods, with a provision that on payment of certain number of instalments the article should belong absolutely to the hirer. In a contract of sale for a price payable by instalments, the purchaser has no option of terminating the contract and returning the chattel, whereas in a contract of hire purchase the hirer has such an option. In the case of a hire purchase contract, the hirer has got an option to purchase, which he may exercise or not according to his sweet will and pleasure; but in the case of a contract of sale the purchaser has become the owner of the chattel, but the price is by agreement payable by instalments. This distinction has been well pointed out in the judgment of the House of Lords in the case of *Helby* v. *Matthews*[2]; the learned Trial Judge in the case before us held that the agreement in question was a hire purchase agreement. That finding is not disputed before us by either of the parties. The question then is whether the learned Judge's direction that the plaintiff should give credit to the defendant for the difference between Rs. 1,140 paid in September, 1927 and Rs. 226 is correct. Now turning to the terms of the agreement between

2. (1895) A.C. 471.

the parties, I find that clause (2) of the agreement provides that

"on the signing of the agreement, the hirer (the defendant) shall pay the owners (the plaintiff) a sum of Re. 1 in consideration of the option to purchase given to the hirer hereunder and the said sum shall become the absolute property of the owners"

Clause (3) is important:

"The hirer shall pay at Madras by way of hire without demand the sum of Rs. 1,140 and thereafter a sum of Rs. 226 on the 12th day of every calendar month beginning with the month next after the date herein until 11 monthly instalments have been made, unless he shall have terminated this agreement as hereinafter provided . . The hirer acknowledges that he holds the vehicle as a bailee of the owner and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as hereinbefore provided and shall have paid the whole amount due in this agreement The owners may terminate the contract of hiring and forthwith recover possession of the vehicle if any monthly hire is in arrear and left unpaid for seven days after the date fixed for its payment."

It is admitted that the defendant committed default in payment of the amounts due for the months of March and the subsequent months. The question is whether on the true construction of the agreement the defendant is entitled to credit for the sum of Rs. 914. If on a proper construction of the contract the defendant is not entitled to the same, then the defendant's contention must be overruled, and no question of any "hardship" to him would, in my view, arise. The parties dealt with at arm's length and there is no question of bargain pressing hard on one and not on the other. For the considerations recited in the agreement and moving from one party, the other party has undertaken to do something. It is admitted that the defendant is not entitled to the return of any of the instalments paid from October, 1927 to February, 1928; but it is contended that the defendant is entitled to the return of Rs 914 out of the amount of Rs. 1,140 paid by the defendant to the plaintiff on the date of the agreement when the bus was delivered to the defendant. Is there any reason for making any distinction between the payment made in September, 1927 and the other payments made subsequently? The agreement speaks of all these payments as payments made "by way of hire." The amount of hire payable by the defendant to the plaintiff has been fixed by the parties; that which is payable in September, 1927, has been fixed by them at Rs. 1,140 and that which is payable on the 12th of each of the succeeding 11 months has been fixed by them at Rs. 226. As it is admitted that it is the defendant who broke the contract, *prima facie* he is not entitled to recover any amounts paid by him to the plaintiff. If this amount of Rs. 1,140 be treated as "hire" it is clear that

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it is hire paid by the defendant for the use of the bus, and it stands on the same footing as the subsequent instalments paid by him; and as he had the use of the bus for the period, the defendant is not entitled to the return of any portion of the hire paid by him. The learned Judge says that the plaintiff is not entitled to retain Rs. 1,140 treating the same to have been paid "as advance of rent," on entering into the agreement; the agreement does not mention this sum as "an advance of rent." My attention has not been drawn to any evidence, or provision in the document, that the sum of Rs. 1,140 was paid as "advance" of rent. If once it is proved or admitted that it is "an advance of rent," then quite different considerations would apply. But, as already mentioned, there is no evidence to support the finding that the amount in question was paid as advance of rent. If parties treated it as "advance of rent," then naturally one should expect the agreement to contain a specific provision as to how this advance of rent was to be dealt with subsequently—whether the same should be returned to the hirer or whether the same should be taken towards the rent due for some particular instalments. The agreement in question does not make any such provision. Further there is no warrant in the case for the view that the hire (rent) due for September, 1927, was only Rs. 226. The agreement only states that the hirer shall pay by way of hire the sum of Rs. 226 on the 12th day of every succeeding month after September, 1927, until 11 monthly instalments have been made, unless in the meantime he shall have terminated the agreement. The provision, as I understand it, is not that the parties have agreed that the proper rent for each month is Rs. 226, but they have made a consolidated provision that the hirer shall pay by way of hire a sum of Rs. 1,140 at the time of the delivery of the bus to the defendant and also pay a sum of Rs. 226 on the 12th day of 11 subsequent months. The essential difference is this. According to the defendant's view, Rs. 226 would represent the rent of a new motor bus for the first month of its user, and the same would be the proper rent for each of the 11 months following. If so, the defendant could have the use of a new motor bus for one month by paying Rs. 226 and he could at the end of the period return the same without being under any further liability to the plaintiff. Again, if defendant's view be upheld, he could return the bus just one day before the expiry of the first month without being liable to pay any amount as rent. Obviously no owner of a new motor bus would agree to let the same on such terms. The obvious intention of the parties should therefore

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be taken to be that the first instalment of rent to be paid was to be Rs. 1,140 and that payable for each of the other instalments was to be Rs. 226. There is nothing wrong in the parties agreeing to different amounts to be paid as rent for different periods. The reasonable view to be taken of the agreement is, in my opinion, that the defendant paid Rs. 1,140 as the first instalment of rent and agreed to pay 11 further subsequent instalments of Rs. 226 each on the 12th of every succeeding month so long as the agreement continued to be in force. But for the fact that the initial payment made by the defendant was a comparatively large amount, the amount due for each of the subsequent instalments would have been much more than Rs. 226; in other words, in fixing the amount of the subsequent instalments, the parties had due regard to the amount of initial payment made by the defendant to the plaintiff. If the amount to which the plaintiff would be absolutely entitled in case of breach of the agreement by the defendant was to be only Rs. 226, that is only a portion of the initial payment, then, it stands to reason, as was contended before us, on behalf of the appellant, that the amount of the subsequent instalments would have been fixed at a very much higher figure than Rs. 226. I am therefore of opinion that the amount of Rs. 1,140 in question should not be taken as "an advance of rent" in the ordinary acceptation of the expression, but that it was the first instalment of rent agreed to be paid by the defendant to the plaintiff for the use of the bus, and that it stands on the same footing as the payments made in respect of the instalments from October to February, and that the defendant is not entitled to a refund of any portion of the same.

If, on the other hand, payment of this amount of Rs. 1,140 should not be treated as payment of rent, it should, in my view, be taken as a *premium* taken by the owner, the plaintiff, with a view to grant the lease to the defendant. If it should be taken as a premium to grant a lease, then the lease having been granted, the defendant is not entitled to have any portion of the said amount returned to him. The same should be taken to have been paid for the plaintiff's executing and granting the lease; and the defendant enjoyed the benefit of the same when he got the lease. This view receives support from the decision of Muthuswami Aiyar and Best, JJ., in *Kunmaran Nambiar* v. *Chindan Nambiar.*[3] The plaintiff-landlord sued to eject the defendant, the tenant, on the ground that the defendant allowed

3 (1894) I.L.R. 18 M 32.

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the rent to fall into arrears and that the landlord was entitled to recover possession on the footing of forfeiture of the lease. It appears that the defendant had paid the plaintiff the consideration (premium) for the grant of the lease. The Lower Courts held that the plaintiff was not entitled to recover possession before he returned the consideration (premium). The learned Judges of the High Court observed as follows:

"We do not agree with the Judge that if the clause for forfeiture of the perpetual lease is enforceable, the plaintiff is only entitled to a decree or refund of the consideration paid by the tenant at the time of obtaining the lease. Ex. A contains no provision for such repayment and an obligation to refund cannot be inferred from the clause for forfeiture . In the case of a lease, the consideration paid for it is exhausted by the grant of the lease, and the tenant's forfeiture of the lease cannot operate to convert the original consideration into a debt."

The High Court held that the plaintiff was entitled to recover possession without returning any portion of the consideration (premium) paid for the grant of the lease. In my view the principle of that decision would apply to the case before me, in case it is taken that the initial payment made by the defendant in this case should be taken to be in the nature of premium for the grant of the lease.

Thus whether the amount in question be treated (as I am inclined to take it) as the first instalment of rent fixed by the parties to be paid by the defendant for the use of the bus, the amount of the subsequent instalments being fixed having regard to the amount fixed as the (1st) initial instalment, or, whether the said amount be taken as "premium" paid to the lessor by the lessee for the grant of the lease, in either view the defendant who broke the contract is not entitled to the return of the same. It was suggested that such a construction of the contract works to the great advantage of the one party (the plaintiff) but works hardship on the other (the defendant). The rights of the parties have to be worked out according to the terms of the contract which they entered into with their eyes open; each got under the contract what he bargained for, and there is no question of fraud or mistake. In this case it seems to me that no question of "hardship" is before the Court for consideration. Further, the judgment of Lord Macnaghten at p. 482 of *Helby* v. *Matthews*[2] mentions considerations which would seem to show that there is no question of "hardship" in such a case at all. His Lordship observed:

"The advantages are not all on one side If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects

2 (1895) A.C. 471

discovered—if a coveted treasure is becoming a burthen and an encumbrance, it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for Parliament to interfere. It is not for the Court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort."

The learned Advocate for the respondent drew our attention to the circumstanace that in *Helby* v. *Matthews*[2] the amount of the initial payment was only 10*s*. 6*d*. and that the amount of each of the succeeding instalments was also only 10*s*. 6*d*. But in my view that does not make any real difference. The subject-matter of hire in *Helby's case*[2] was a pianoforte, whereas the subject-matter of the agreement before us is, as already mentioned, a new motor bus; and one can well understand the effect of the first few months' use on the respective chattels concerned, on which will depend the amount of the initial payment of hire. It was also argued on behalf of the respondent that in the case of *Brooks* v. *Beirnstein*[4] there was a specific provision that the hirer was in no case to be entitled to any credit for the amount paid for option or for the said rent or in part thereof except at purchase of the said furniture under the provisions of the agreement. But that circumstance also does not, in my view, make any difference for the reasons mentioned by me already. In *Brook's case*[4] the hirer paid £1 on the signing of the agreement, £14 at the time of the delivery of the furniture and £20 before the 29th of June, 1907, in all making £35. He had also paid rent at £7 per month for the subsequent months but got in arrear and owed £51 for rent unpaid. The owners, in exercise of the powers given to them by the agreement, re-took possession of the goods and claimed the arrears of rent of £51 without giving credit to any portion of £35 paid by the hirer. As mentioned by Bigham, J. :

"But in truth the hirer has enjoyed the use of the furniture which was the consideration for the rent, and I can see no reason why he should not be liable to pay the arrears claimed."

Our attention has not been drawn to any Indian case on the point. For the reasons mentioned by me, I am not able to make any distinction between the sum of Rs. 226 paid on various occasions by the defendant and the sum of Rs. 1,140, the initial payment made by him. If the former represent hire or rent, I think that the latter also should be taken to have the same legal characteristic. There is no evidence to show that the rent for September, 1927, was fixed as at something less than Rs. 1,140. I do

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not feel justified in fixing the proper rent for the first month (September, 1927), at Rs. 226, nor am I able to find any evidence or any indication to support the argument that the amount of Rs. 1,140 should be taken as payment of "advance of rent." If, however, the said amount be taken to represent "premium" (consideration) paid for the grant of the lease, then the lease having been granted and the defendant having admittedly had possession and enjoyment of the bus for some months, the consideration, that is the premium, paid has become exhausted by the grant of the lease, and in that view also the defendant is not entitled to the return of the same or any portion thereof. The agreement in question is one of hire-purchase and the parties having dealt with each other at arm's length, each had what he bargained for; no question of hardship arises in my view of the case. In a case of this nature, it is with great reluctance that I have had to differ from the decision of the learned Judge. But, for the reasons given by me above, I think that the direction in the decree that the defendant should be given credit for the sum of Rs. 914 is not correct, and that the appeal should be allowed with costs.

A.S.V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN, LORD THANKERTON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

R. M. A. R. R. M. Arunachalam Chetty .. *Appellant**

v.

V. E. A. Vayiravan Chetty and others .. *Respondents.*

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Nattukottai Chetti—Banking firm of—Deposit with, under heading "A maral B"*—Liability in respect of, to* A *or to* B*—Payment to* maraldar B *if a good discharge*—Maraldar—*Position and rights of.*

In the year 1888 the widow of *R*, a Nattukottai Chetti, handed over a sum of Rs. 5,000 to her father, *V*, to be deposited by him with a certain Chetti firm in Rangoon, where high rates of interest prevailed. The deposit was duly made with the agreed firm, but in 1892 the fund was transferred by *V's* firm (known by the initials A.M.V.R.), to another Rangoon firm known as V E A. There was nothing to show under what circumstances that transfer was made. It was not done at the instance of *R's* widow or after consultation with her, and it was evidently a mere change of investment made at the assumed discretion of *V*. The V E A firm credited the fund, which then amounted to over Rs. 10,000, in their

*P.C. Appeal No. 144 of 1927. 4th July, 1929.

books under the heading "R M.A.R.R.M." (which denoted the firm of R), "*maral* A.M.V.R.".

In 1895 a portion of the amount was withdrawn, and shortly afterwards there was a further deposit. The withdrawal and further deposit were apparently made by the A.M.V.R. firm, and there was no direct dealing between either the R.M.A.R.R.M. firm or *R's* widow and the V.E.A. firm. Interest was duly credited on the deposits by the V.E.A. firm, and accounts were rendered annually to the A.M.V.R. firm, and that continued till 1904, when the A. M. V. R firm, having opened a branch of their own in Rangoon, the balance of the fund was at their request paid over to them by the V.E.A. firm and the V.E A. deposit account was finally closed During the whole of that period there was no communication of any sort between *R's* firm or *R's* widow and the V.E.A. firm, and no reference was made to either of them or to the appellant, the adopted son of *R,* who was then of full age, when the V E.A. account was closed Between 1904 and 1917, when the suit was filed, *R's* widow and the appellant, her adopted son, made numerous withdrawals from the A.M.V.R. firm, and apparently regarded it as solely responsible to them for the deposit.

Held, affirming the High Court, that, as regards the liability of the V.E.A. firm to the appellant for the fund which had been deposited with them by *V's* firm, no conclusion could be based upon the mere use of the word "*maral*", that it was a question to be decided upon all the circumstances of the case whether the intention was that *V* and his firm, while remaining directly responsible to those to whom the beneficial interest in the fund belonged, should have authority to change its investment from time to time and to give a valid discharge for its repayment; and that, in view of the relationship of the parties, the course of dealing between them, and the other facts of the case, the only possible inference was that *V* and his firm were alone to be responsible to the appellant and his mother, and that the repayment in 1904 by the V.E.A. firm to *V's* firm, with whom alone they had dealt, was a good discharge of their liability.

The *maraldar* is clearly something more than a bare agent, the limit of his powers and responsibilities depending upon the understanding between the parties.

Appeal No. 144 of 1927 from the High Court of Judicature at Madras.

De Gruyther, K.C. and *C. Sydney Smith* for appellant.

Upjohn, K.C. and *K. V. L. Narasimham* for respondents.

4th July, 1929. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—The appellant, in conjunction with his mother, Valliammai, sued two sets of defendants in the Court of the Subordinate Judge of Sivaganga for the recovery of the balance of certain deposits made under circumstances hereinafter detailed. The plaintiffs succeeded in the first Court in respect of the greater part of their claim against both sets of defendants. In the Court of Appeal the decree was upheld only against the first set of defendants, who are persons of no substance, and the suit was dismissed against the other and more substantial defendants. The question on appeal to His

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Majesty in Council is whether the second set of defendants are liable.

It is now admitted that the deposits in question were made in the year 1888 as the result of a family arrangement. Valliammai was a sonless widow whose husband Ramanathan had died two years previously. In order to provide for a future adoption by Valliammai a sum of Rs 5,000, made up partly from her *stridhan* and partly by contributions from her own father, Veerappa, and her father-in-law, Arunachellam, was handed over to Veerappa to be deposited by him with a certain Chetti firm in Rangoon, where high rates of interest prevailed. The deposit was duly made with the agreed firm, but in 1892 the fund was transferred by Veerappa's firm (which is known by the initials A.M.V.R.) to another Rangoon firm known as V.E A., whose representatives were the second set of defendants in the suit (defendants 7—11) and the respondents in this appeal, defendants 1—6 being the representatives of Veerappa's firm, whose liability was affirmed by the High Court in appeal. There is nothing on the record to show under what circumstances this transfer was made, but it is not suggested for the appellant that it was done at Valliammai's instance or after consultation with her, and it seems to [illegible] made at the assumed discretion of Veerappa.

The V.E.A firm received the fund, which then amounted to over Rs. 10,000, and credited it in their books under the heading "R.M.A.R.R.M." (which denoted the firm of Valliammai's deceased husband, Ramanathan), "*maral* A.M.V.R.," *i e.*, as received through Veerappa's firm (A.M.V.R.), though the exact implication of the word "*maral*" is a matter in dispute between the parties.

In 1895 the appellant, then a minor, was adopted by Valliammai, and a sum of Rs. 6,680 was withdrawn from the fund for the expenses of the adoption Shortly afterwards a sum of Rs. 900, representing presents made to the adopted boy, was added to the deposit in the hands of the V.E.A. firm. This withdrawal and further deposit were apparently made by Veerappa's firm (A.M.V.R.), there being no evidence of any direct dealing between either Ramanathan's firm (R. M. A. R. R. M.) or Valliammai and the V.E.A. firm in Rangoon.

Interest was duly credited on the deposits by the V.E.A. firm, and accounts were rendered annually to the A.M.V.R. firm, and this continued till 1904, when the A.M.V.R. firm, having opened a branch of their own in Rangoon, the balance

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of the fund was at their request paid over to them by the V.E.A. firm and the V.E.A. deposit account was finally closed.

During the whole of this period there seems to have been no communication of any sort between Ramanathan's firm or Valliammai and the V.E.A. firm, and no reference was made to either of them or to the appellant, who was then of full age, when the V.E.A. account was closed. The appellant made no enquiries as to the state of the account, as to the payment of interest, or the mode of investment. Between 1904 and 1917, when the suit was filed, he and his mother made numerous withdrawals, amounting in all to Rs. 8,700, from the A.M.V.R. firm, and apparently regarded it as solely responsible to them for the deposit. Veerappa, the head of the firm, was the appellant's grandfather, and he survived till 1914. He had himself contributed the major part of the original deposit, and there is no suggestion that during his lifetime the firm was in other than good circumstances.

The significance of this prolonged course of dealings from 1904 onwards between the appellant and Veerappa's firm seems not unnaturally to have been a matter of some anxiety to the appellant, and he tried to account for the withdrawals of the Rs. 8,700 by the allegation that he had other and independent funds with the A.M.V.R. firm, but this has been held by both Courts in India to be untrue, and it is not now disputed that they were withdrawals from the deposit account in suit.

It may also be noted that in a power of attorney from Valliammai to the appellant, given in 1917 with a view to the suit, it is stated that her *stridhan* moneys, which formed part of the original deposit, were "due to her only from the family of her father."

On this state of facts their Lordships have to decide whether the V.E.A. firm, represented by the respondents in this appeal, are liable to the appellant for the fund which was deposited with them by Veerappa's firm, and the proper balance of which was repaid by them to that firm as long ago as 1904.

The appellant's case has been rested before this Board mainly on the heading of the account as kept by the V.E.A. firm. The money, it is contended, was credited by them to Ramanathan's firm (R.M.A.R.R.M.), Veerappa's firm only appearing in their accounts as the *maraldar, i.e.,* the agent through whom the deposit was made; the receipt of Veerappa's firm, therefore, could not be a valid discharge as against the

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appellant; moreover, the Appeal Court held that the V.E.A. firm must have known who the R.M.A.R.R.M. firm were. It might perhaps be objected that neither the appellant nor Valliammai was shown to represent the R.M.A.R.R.M. firm, nor did they sue as representing it. It may well have been that the V.E.A. firm in Rangoon knew who the R.M.A.R.R.M. firm were without knowing anything about Valliammai or her adopted son, but their Lordships do not think it necessary to pursue this suggestion.

Much time was devoted in the Subordinate Judge's Court to the discussion of a *maraldar's* position and responsibilities under the trade usage prevailing among the Chettis of Southern India, but nothing definite results from the discussion. It has not been suggested that a custom was established, and it has not been seriously contended for the appellant before this Board that any conclusion can be based upon the mere use of the word "*maral.*" The *maraldar* is clearly something more than a bare agent, the limit of his powers and responsibilities depending upon the understanding between the parties. It is, in their Lordships' opinion, a question to be decided upon all the circumstances of the case whether the intention was that Veerappa and his firm, while remaining directly responsible to those to whom the beneficial interest in the fund belonged, should have authority to change its investment from time to time and to give a valid discharge for its repayment; and having regard to the relationship of the parties, the course of dealing between them, and the other facts set out above, their Lordships have no doubt that the only possible inference is that Veerappa and his firm were alone to be responsible to the appellant and his mother, and that the repayment in 1904 by the respondents' firm to Veerappa's firm, with whom alone they had dealt, was a good discharge of their liability.

Their Lordships are therefore satisfied that the decree of the High Court in India should be affirmed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of this appeal.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE AND LORD ATKIN.

Messrs. Kamlapat-Moti Lal .. *Appellants**

v.

The Union Indian Sugar Mills Company, Limited (in liquidation) .. *Respondents.*

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Messrs. Kamlapat-Moti Lal *v.* The Union Indian Sugar Mills Co., Ltd.

Companies Act (VIII of 1913), S 153—Mortgage by Company for stated sum—Scheme for, approved by shareholders—Mortgage for an increased sum—Sanction by Court of—Validity—Scheme under S. 153—Plea in Court below, of—Privy Council Appeal—Plea in, of scheme for financing Company's affairs—Maintainability—Mortgage deed—Usufructuary or not—Test—Mortgagees under usufructuary mortgage—Duties of—Transfer of Property Act, S. 76—Effect.

After a winding-up order had been made on a creditor's petition, the Court directed a meeting of shareholders of the Company to be held to decide whether they would accept a scheme (believed by all parties and the Court to be one under S. 153 of the Indian Companies Act of 1913) put forward by one *K* to advance a sum of Rs. 10 lacs on mortgage and alternatively to purchase the Company at Rs. 11,50,000. A meeting of the shareholders was duly held, and *K's* scheme was accepted by a large majority. The approval of the meeting was not, however, taken subject to modifications to be approved by the Court. Subsequently it was found that the advance of Rs. 10 lacs was not sufficient, and that a further advance of Rs. 62,000 was necessary. *K* agreed to make the further advance, and his scheme was approved by the Court which directed a mortgage deed to be executed in favour of *K* for the sum of Rs. 10,62,000. The assent of the shareholders to the amended scheme was, however, not obtained, and, in the circumstances of the case, it was not possible to say that the amended scheme had been approved by the shareholders at the meeting held to consider *K's* scheme or that they had impliedly assented to an increased advance of Rs. 62,000.

Held, that the shareholders of the Company could not be held to have assented to the amended scheme, and that the orders of the Court approving the same and directing the preparation of a mortgage deed pursuant to the same should be set aside

Held further, that the Court below having proceeded on the footing that the scheme was one under S. 153 of the Companies Act of 1913, the plea that the scheme was a mere scheme for financing the Company's affairs which the Court could in the liquidation approve without the necessity of having it approved by the shareholders could not be entertained in the appeal to the Privy Council.

Held also, on a construction of the deed of mortgage proposed to be executed by the Company, that the proposed mortgage was an usufructuary mortgage, and that no further duty of care could be imposed upon the mortgagees under such a mortgage than arose out of the statutory duties imposed upon mortgagees in possession under S. 76, Transfer of Property Act on the one hand, or of the ordinary legal duties of managing agents on the other.

*P.C. Appeal No. 133 of 1928. 5th July, 1929.

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Appeal No. 133 of 1928 from the High Court of Judicature at Allahabad.

Upjohn, K.C., Dunne, K.C. and *Cecil W. Turner* for appellants.

Simonds, K.C. and *J. H. Stamp* for respondents.

5th July, 1929. Their Lordships' judgment was delivered by

LORD ATKIN.—This is an appeal from the High Court of Judicature at Allahabad in a proceeding in the course of the winding up by the Court of the Union Indian Sugar Mills Company. On the 28th May, 1926, the winding-up order was made on a creditor's petition. The company carried on an extensive business and strenuous efforts were made by the shareholders to save the concern. Eventually alternative proposals were made by various financial houses either to buy the undertaking out and out or to advance on mortgage defined sums on the terms that the mortgagees managed the business for a term of years and recouped themselves out of the profits. In due course these proposals were laid before the Court by the liquidators for direction. The Court directed a meeting of shareholders to be held to decide whether they would accept the offers of Lala Har Kishin Lal or of Lala Kamlapat, the appellants. Both parties had put forward a scheme to advance substantial sums on mortgage; and both had alternatively offered to purchase at a named sum. It is clear that all parties concerned and the Court considered that they were acting under the provisions of section 153 of the Indian Companies Act, 1913, which provides that where an arrangement is proposed between the company and its members or any of them, the Court may order a meeting of the members of the Company; and if a majority of three-fourths in value present in person or in proxy at the meeting agree to any arrangement, the arrangement if sanctioned by the Court shall be binding on the members and the Company. The question was raised by Counsel for the liquidators whether in fact the proposals did amount to an arrangement between the Company and its members; but for reasons to be given later this appears to their Lordships in the circumstances of this case immaterial. The proposal of the appellants Kamlapat as laid before this meeting was as follows:—

That the applicant is willing to advance a sum of Rs. 10 lacs to the above Company in liquidation on the terms annexed herewith and is also prepared to purchase it for rupees eleven lacs fifty thousand on the conditions mentioned therein.

1 Deposit of Rs. 1,50,000 to-day and Rs 8,50,000 within a month of this date, which should be paid to creditors as early as possible, the balance, if any, after paying the legal debts, to be returned to us.

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2 The Company to be mortgaged to us at 8 per cent compound interest with six monthly rests.

3 We to be the managing agents for ten years even if mortgage paid off earlier, and to get all the advantages which the present managing director enjoy and to get 5 per cent. commission on net profits only

4. The mortgage with interest to be paid off first and then the shareholders to get the profit

5. We to provide entire working capital against the goods of the Company at 8 per cent per annum.

6 The Company to be handed over to us as soon as we deposit the entire money.

7.* The consent of the shareholders to be obtained to the above scheme.

8. In case the shareholders do not accept the scheme, we are willing to purchase the Company at Rs. 11,50,000.

(Signed) KAMLAPAT
(Signed) RAMAKANT MALAVIYA, vakil for L. Kamlapat.

22nd November, 1926.

The meeting of shareholders was duly held on the 16th December, 1926, and Kamlapat's scheme was accepted by a large majority. On the 21st December the liquidators reported that they had received claims from creditors amounting to Rs. 10,61,168. On the same day the Court sat to consider the approval of Kamlapat's scheme. They found, however, as they state in their judgment, that a new situation had been created by the liquidators' report, inasmuch as the previous proceedings had taken place under the impression of the Court as well as the previous persons interested, that the sum of Rs. 10,00,000 would fully satisfy all the creditors. Hopes were, however, held out that Kamlapat might increase their offer to advance 10,00,000 to 12,00,000. Rather than decide to reject the scheme or accept an offer for an out-and-out sale, the Court decided to adjourn the matter to enable Kamlapat to increase their offer; and consented that Kamlapat should be given immediate possession on the understanding that the out-and-out sale or the mortgage should be effected in his favour in the near future. On the same day Kamlapat completed the payment of Rs. 10,00,000 to the liquidators. On the 24th December they were given possession of the properties by the liquidators. On the 7th January Kamlapat stated that they were willing to advance a further sum of Rs. 37,000 which, with the Rs. 10,00,000, they believed would be sufficient to discharge all the liabilities and to advance a further sum of Rs. 25,000 to cover the liquidators' charges "on the terms proposed for 10 lacs." On this footing the scheme went forward. On the 25th February the Court appear to have approved the scheme in principle. They directed that a mortgage deed be executed for Rs. 10,62,000. The terms were to be submitted to the Government conveyancer. After the terms had been

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settled by the parties and examined by Mr. Weir they were to be submitted to the Court for their consideration and sanction.

Disputes, however, arose between Kamlapat and the liquidators as to the terms of the mortgage deed. Eventually, by order dated the 20th June, 1926, the Court approved the deed as settled by Government conveyancer and directed the liquidators to take steps for getting it executed. Unfortunately, it seems to have escaped the notice of the Court that the scheme approved by them and purporting to be recorded in the draft deed was not the scheme accepted by the meeting of shareholders. The accepted scheme provided for an advance only of 10 lacs; the new scheme evolved by the new situation provided for a further advance of Rs 62,000. It is possible that the shareholders would have gladly accepted the further advance; it is, however, possible that they might consider the extra burden turned the scale; and indeed a warning note had been sounded by three shareholders, who by a petition of the 28th March pointed out that the shareholders had accepted an advance of Rs. 10 lacs only; that it was uncertain whether even Rs. 62,000 more would meet the further liabilities; that prices were going down and they petitioned for an out-and-out sale. The scheme had been put before the meeting in written form submitted to the Court by Kamlapat; the approval of the meeting was not taken as is usual in carefully drawn schemes subject to modifications to be approved by the Court. Their Lordships find it impossible to hold that the amended scheme had been approved by the shareholders at the meeting on the 16th December or that the shareholders impliedly assented to an increased advance of Rs. 62,000.

Faced with this difficulty Counsel for the liquidators argued before the Board that the scheme was not within section 153 at all; and that it was a mere scheme for financing the company's affairs which the Court could in the liquidation approve without the necessity of having it approved by the shareholders. Their Lordships find it unnecessary to determine whether this was a scheme under section 153. It is plain that the Court thought that it was; and as it appears in any case that the action of the Court has throughout been taken on the basis that the particular scheme they were approving had in fact been accepted by the shareholders' meeting the case must be dealt with on that footing. The result is that as the shareholders have not assented to the scheme as approved the orders of the Court, dated the 25th February, 28th March, 7th, 9th, 20th, 29th April, 4th, 23rd, 25th May, and 20th June, 1927, must be set aside. A meeting of shareholders should be summoned to consider the

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amended scheme; and it seems advisable that the scheme as laid before the shareholders should be more detailed than before; and should reserve the power to the Court to approve modifications. Meanwhile proceedings in the liquidation should be confined to the steps necessary for laying the scheme before the meeting and reporting thereon to the Court.

As the terms of the draft deed are in the circumstances reopened, it seems unnecessary for the Board to settle its terms where these have been in dispute. But as the matters have been argued before them their Lordships think it right to intimate that they have no doubt that the proposed mortgage is an usufructuary mortgage; and that no further duty of care can be imposed upon the mortgagees than arises out of the statutory duties imposed upon mortgagees in possession under section 76 of the Transfer of Property Act on the one hand, or of the ordinary legal duties of managing agents on the other. They cannot see that any advantage is gained by seeking expressly to define these. On the question of net profits they express no opinion as the parties seem to have been agreed as to how these should be calculated.

Their Lordships consider that the abortive result of the proceedings in the High Court is due in part measure to the failure of the appellants to take the objection on which they have succeeded. It was suggested at one time tentatively and not pressed. In the circumstances they come to the conclusion that there should be no costs of the appeal. The appeal should be allowed and the orders already mentioned should be set aside. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondents: *Douglas, Grant & Dold.*

K.J.R. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN, LORD THANKERTON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Raja Pateshwari Partab Narain Singh, since deceased (now represented by Raja Jwaleshwari Partab Narain Singh) .. *Appellant* *

v.

Sitaram and others .. *Respondents.*

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Raja Pateshwari Partab Narain Singh v. Sitaram.

Oudh Laws Act (XVIII of 1876)—Pre-emption right—Claim to—Waiver of—Acts amounting to—Effect of—Village community within S 7 of Act—

*P.C. Appeals Nos 29, 30 and 31 of 1928. 5th July, 1929.

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Raja Pateshwari Partab Narain Singh v. Sitaram.

Interest in land acquired by devise—Persons having, if constitute a village community merely by reason thereof—Village community not existing otherwise—Effect—Membership of village community—Condition—Notice under S. 10 of Act—Omission to give, when immaterial—Agreement for sale—Statutory rights attached under Transfer of Property Act to—Pre-emption right conferred by Oudh Laws Act—Conflict between—Effect.

A large tract of waste land, which had originally been granted by the Secretary of State to one *C*, and which had under subsequent Settlement proceedings been constituted a separate "village" (the word "village" denoting little, if anything, more than a revenue unit), was vested, on *C's* death, under the provisions of his will in ten persons living in England, and was managed on their behalf in India by one *S* The owners being desirous of disposing of the property, it was divided up into a number of blocks, which were offered for sale locally by *S*. Appellant purchased one of those blocks, and he claimed a right of pre-emption in respect of the sales of other blocks to other persons, basing his claim on the provisions of Chapter II of the Oudh Laws Act of 1876

It appeared that the appellant, knowing that all the blocks were in the market, told *S* that he wished to purchase only that block which was adjacent to his own estate, and which he eventually purchased, and that he did not wish to purchase any other block. The oral agreement for sale with one of the respondents was no doubt entered into some time prior to the agreement with the appellant, but when the appellant refused to purchase any of the other blocks he was aware of the agreement with that respondent and acquiesced in it.

Held, that even if the prior completed purchase by the appellant would, under other circumstances, have given him the right of pre-emption in respect of the blocks purchased by the respondents, he must be taken by his conduct to have waived that right, and that it would be inequitable to allow him to re-assert it.

Quaere: Whether *C's* devisees should merely by reason of an interest in the land so acquired be assumed to constitute a village community (within the meaning of the Oudh Laws Act) which was not shown to exist apart from themselves.

Semble: Membership of the village community is not confined to persons having an interest in the village lands.

Quaere as to the result of a competition between the rights acquired by a contract for sale and those attaching under the Oudh Laws Act to a completed conveyance.

Held further, that the appellant, who refused to purchase any of the other plots and who acquiesced in the sale to the respondent could not complain of the want of notice under S. 10 of the Oudh Laws Act

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Dunne, K.C. and *Jopling* for appellant.

De Gruyther, K.C., Dube and *Parikh* for respondents.

5th July, 1929. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—These three consolidated appeals raise a somewhat unusual question under the law of pre-emption in Oudh. The facts are as follows:—

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In December, 1872, the Secretary of State made a grant of a large tract of waste land in the Gonda district to one William Cooke. The land was described in the deed of grant as situated in the village of Agya, but under subsequent Settlement proceedings it seems to have been constituted a separate "village" known as Cookenagar Grant. The word "village" in this connection, however, denotes little (if anything) more than a revenue unit. In 1924, when the transactions which led to this litigation took place, the original grantee was dead, and the estate was vested under the provisions of his will in ten persons living in England, and was managed on their behalf in India by a Mr. Stern. The owners being desirous of disposing of the property, it was divided up into a number of blocks, which were offered for sale locally by Mr. Stern. Block No. 19 was purchased by the appellant, the Raja of Basti; blocks Nos. 7 and 9 by Dargahi (now deceased and represented by Sitaram and Madho) and Mata Prasad, the respondents in two of the appeals; and blocks Nos. 10—13, 15 and 20 by Raja Mohammad Mumtaz Ali, the respondent in the third appeal. It is not now disputed that the conveyance of block No. 19 to the appellant was executed and registered on the 9th June, 1924, before any of the other sales were formally completed, though the conveyance of block No. 7 to Dargahi and Mata Prasad was executed on the same day, but at a later hour. The sale to Raja Mohammad Mumtaz Ali was not completed till the 18th June, 1924 and the second sale to Dargahi and Mata Prasad (block No. 9) not till the 21st July following.

Under these circumstances the appellant claimed to pre-empt the other blocks, and filed three suits in the Court of the Subordinate Judge of Gonda against their several purchasers to enforce his claims. The two suits against Dargahi and Mata Prasad were tried together and one judgment was delivered in both, the Subordinate Judge holding that the appellant's claim in respect of block No. 7 was not established, but that his claim in respect of block No. 9 was. The one suit was therefore dismissed, and in the other a decree for pre-emption was made upon the usual terms. The third suit against Raja Mohammad Mumtaz Ali was tried by the same Judge, but separately, and was also dismissed. Appeals were filed by the unsuccessful parties in each of the three cases to the Chief Court of Oudh. The appeals were apparently heard together, and were decided by one judgment, the result of which was that the appellant, the Raja of Basti, was defeated in all three cases, his two appeals

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being dismissed, and the appeal of the respondent purchasers of block No. 9 being allowed.

The appellant before this Board has maintained his right to pre-emption in all the three cases under the provisions of Chapter II of the Oudh Laws Act, XVIII of 1876.

On the argument of these appeals a number of questions have been raised of considerable complexity and depending upon the intimate construction of this somewhat abstruse enactment. Their Lordships, however, are satisfied that the appellant must fail in each of them on the threshold of the Act, having regard to certain findings of fact in which both the Courts in India have concurred.

The sales in question were all carried out on behalf of the vendors by Mr. Stern. The blocks were in the market for some time. They were clearly delineated upon separate plans, and separate *khasras* and *jamabandis* were prepared for each. The Subordinate Judge held that the appellant had procured a list of all the blocks, containing the prices; that he knew that they were all in the market and could be had for these prices, but that he definitely refused to purchase any but block No. 19, which was adjacent to his own estate. The Appellate Court came in effect to the same conclusion. They held that the appellant told Mr. Stern that he wished to purchase block No. 19 only and that he did not wish to purchase any other block. The oral agreement for sale with Raja Mohammad Mumtaz Ali was entered into some time prior to the agreement with the appellant, but both Courts held that when he refused to purchase any of the other blocks he was aware of the agreement with Raja Mohammad Mumtaz Ali and acquiesced in it.

Upon this state of facts their Lordships are clearly of opinion that, assuming that the prior completed purchase by the appellant would, under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him now to re-assert it. This principle has been recognized in previous cases by the Oudh Courts: see *Bhagwat Singh* v. *Syed Nasir Husain*,[1] *Bank of Upper India and others* v. *Munshi Alopi Prasad*[2] and *Hanuman Singh and another* v. *Adiya Prasad and another*[3]; and it has been applied to some extent at all events by the judgment of the Subordinate Judge in the present case.

1. (1902) 5 Oudh Cas 395 2. (1907) 10 O.C. 257.
3. (1919) 22 O.C. 323

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Having come to this conclusion, their Lordships will only touch briefly upon certain other questions which have formed the subject of argument before them.

The decision of the Chief Court ultimately turned upon the question whether the appellant was by reason of his purchase a member of the village community of Cookenagar Grant, inasmuch as under section 7 of the Oudh Act the right of pre-emption is only to be presumed to exist in "village communities." This expression is not defined in the Act, and no evidence was given in any of the suits as to the existence of a "village community" in Cookenagar Grant. It was, however, contended for the appellant that, upon the death of Cooke, who was till then the sole owner of the village, the ten persons living in England who were his devisees became a village community within the meaning of the Act, and that as soon as the appellant purchased block No. 19 he became a member of that community. It may be that, as appears to have been held in other cases by the Oudh Courts, only persons having an interest in the village lands should be deemed to be members of the community, though their Lordships are not prepared in the present case to affirm the correctness of this proposition; but it by no means follows from this that Cooke's devisees merely by reason of an interest in the land so acquired should be assumed to constitute a village community which was not shown to exist apart from themselves.

Another question which was the subject of considerable discussion before this Board turned upon the possible competition between the rights acquired by a contract for sale and those attaching under the Oudh Act to a completed conveyance. It was found by the Courts in India that the agreement for sale of Raja Mohammad Mumtaz Ali's plots was prior in date to the agreement for sale of block No. 19 to the appellant, but that the registered sale deed of the appellant preceded by some ten days the completion of Raja Mohammad Mumtaz Ali's purchase. Both Courts were of opinion that under these circumstances the appellant had no right of pre-emption as against Raja Mohammad Mumtaz Ali. It may be that in such a case there is a direct conflict between the statutory rights attached under Chapter III of the Transfer of Property Act to an agreement for sale, and the right of pre-emption conferred by the Oudh Laws Act, and that this question may need further consideration at some future time. Their Lordships do not think it necessary to come to any conclusion upon it in these appeals.

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The matter of notice under section 10 of the Act was also discussed. It was admitted that no formal notice of his proposal to sell any of the plots in suit was given by Mr. Stern, but in their Lordships' view this cannot help the appellant. His refusal to purchase any of the other plots, and his acquiescence in the sale to Raja Mohammad Mumtaz Ali may well have induced Mr. Stern to believe that the statutory notice was unnecessary, and if it had been given it seems clear that the present suits would have been barred by section 11.

For the reasons already stated, their Lordships are of opinion that the present appeals must fail, and they will humbly advise His Majesty that they should be dismissed. The appellant must pay the costs of both sets of the respondents.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondents: *H. S. L. Polak & T. L. Wilson & Co.*

K.J.R. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. BEASLEY, *Chief Justice* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

In the matter of THANGATHAYEE AMMAL, A MINOR.

Subbuswami Goundan .. *Petitioner**

v.

Kamakshi Ammal and another .. *Respondents.*

Subbuswami Goundan v. Kamakshi Ammal

Criminal Procedure Code (*V of* 1898), *S* 491—*Application by husband of minor married girl for an order to direct the bringing up of the girl to the Court and handing her over to the petitioner—Matters to be considered by the Court—Desire of the girl to reside elsewhere than with her husband—Effect—Another less expensive remedy under the Guardians and Wards Act open to the petitioner—Effect on his remedy for* writ *of* Habeas Corpus—*"Illegal detention"—Meaning of—Person keeping a minor girl in his custody with her consent—Application by another person better entitled in law to have the custody—Custody by the former, if can be said to be illegal detention.*

In an application to the High Court for an order directing the bringing up to the Court of a minor married girl aged about 13 years and also for an order directing that she be handed over to the petitioner who is her husband, what the Court has to consider is the welfare of the minor wife and in doing so the fact that she prefers to reside elsewhere than with her husband would not be entitled to very much or any weight at all, although had she been old enough to form a good opinion, this would have been a very important circumstance for consideration

Where a person is entitled to a remedy under S. 491 of the Criminal Procedure Code, the fact that he is also entitled to a remedy for the same relief under the Guardians and Wards Act which would be less expensive does not disentitle him from pursuing the former remedy.

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*Cr.M.P. No. 468 of 1929. 2nd July, 1929

Subbuswami Goundan v. Kamakshi Ammal.

A person who keeps a minor girl in his custody with her consent can be said to have illegally detained her, if another person who is better entitled in law to have the custody of that person as her husband desires to have that custody.

Abrahani v *Mahtabo,* (1889) I.L.R. 16 C. 487 followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ* of *Habeas Corpus* directing the respondents to produce Thangathayee Ammal, the minor wife of the petitioner herein, before this Court to be dealt with according to law and to hand over the custody of the said minor Thangathayee Ammal to the petitioner herein.

K. S. Jayarama Aiyar for petitioner.

Md. Askar Ali for respondents.

The Court made the following

ORDER.—This is a petition praying for an order directing the bringing up to the Court of a minor married girl and also for an order directing that she be handed over to her husband, who is the petitioner. The young girl is the wife of the petitioner and the first respondent is the mother of the minor girl and the second her step-brother. The petition is founded on the allegation that after the marriage the wife having got into the custody of the two respondents, they have illegally detained her. If these facts are proved, then it is quite sufficient for us to make the order prayed for, if we are satisfied that it is in the interests of the wife that she should be handed over to the care of the person who should naturally have her in his charge, namely, her husband. The petitioner married this young girl on the 9th March, 1927. She is said to have been about 10 or 11 years of age then—the evidence as to the exact age of these children is usually rather indefinite and vague—but assuming her age to have been 11 years, she is now just over 13 years. She is of the Goundan class and, according to the petitioner, it is the custom of that caste for wives even before they have attained puberty to reside under the husband's roof. In this case, it is asserted by the petitioner that she resided under his roof and under the roof of his mother for some seven, eight or nine months. That assertion is denied by the respondents, who say that except for two periods, each of them of about 8 days, she has all along since the marriage resided with the respondents. The petitioner's case is that after the marriage she was living with him at Sindupatti, where he was then Sub-Registrar and that afterwards she was living with his mother at his family house at Pannaipuram. Whilst there, there was, according to him, an outbreak of

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plague, and having the health and safety of his wife to consider, she was then sent home to the respondents, where she has been living since. As I have stated, the respondents' case is that this is untrue and that except for these two periods of 7 or 8 days at a time she has never resided under the roof of her husband. Last year the petitioner met with a very serious motor accident which necessitated his having to take leave for a year and during that time he was not nursed by his wife. On his return from leave his wife attained puberty—this was some six months ago according to him—and he wished to consummate the marriage and sent word to the respondents stating his willingness to do so, but the respondents refused to send the girl and there is no question about it at all that the puberty ceremonies did not take place until two or three months after the girl attained puberty. The petitioner's case is that during this time the respondents were attempting to extort from him a large sum of money and some lands as a condition for allowing the girl to return to him; and evidence upon this point has been called and it is abundantly clear to us that, whatever may be the real facts with regard to that, the petitioner had to pay Rs. 100 to the respondents towards the expenses of the puberty ceremonies.

Counter-affidavits have been filed by the first and second respondents. The first respondent has not signed her own affidavit but it is signed on her behalf by the second. Both the affidavits contain largely matters which are entirely irrelevant and which, if true, would merely be reasons for not allowing the young girl to have married the petitioner at all. They do not set forth any valid reasons for detaining the girl after her marriage and refusing to allow her to return to her husband. However, it is asserted that on the occasion of her first visit to her husband after the marriage, which it is alleged by the respondents was only for some eight days and on this occasion she was accompanied by her mother, the wife was subjected to ill-treatment, the story being that she was sent by the petitioner to fetch water and as there was some delay in getting it he abused her, kicked her and beat her and later on sent her away. That is the story put forward by the respondents and is the one reason which is strongly relied upon by them here as a justification for the girl being with them as it is alleged that the girl is unwilling to return to her husband. We may say also that it is the case of the respondents that they have not detained her against her will; on the contrary, it is their case that they are and have been all along most anxious that she should return to her husband and have endeavoured to get her to do so. But they say

that this young girl is extremely self-willed and under no circumstances would she ever think of, or be willing to return to, her husband, the reason for this being that she fears a further outbreak of ill-treatment. So that the respondents' case is that they have not detained her and have always been willing that she should return to her husband, but that she of her own free will remained with them and no persuasions or inducements would get her to rejoin her husband.

We ordered the girl to be brought here and also ordered the attendance of both the respondents and the petitioner. We questioned the wife in chambers and the conclusion we have come to with regard to her—and it is a very definite and clear conclusion—is that she has been tutored by the respondents. That appears to us to be beyond all question. With regard to certain questions put to her touching important matters in the case, she pretended that she knew nothing of them at all and she is obviously an untruthful person, because it is said that she was taken to Madura and stayed there for some time for the purpose of undergoing treatment to her eyes. This she herself denied but even her mother, the 1st respondent, admitted, although reluctantly that this was the case. When asked whether she was willing to return to the petitioner she definitely and with a great show of resolution said that nothing could ever induce her to return and that she would rather die than return to him. We are satisfied that in so saying she was not expressing her own opinion at all, but that she was told to say this by her mother and the second respondent. That being so, much of the argument which has been addressed to us on behalf of the respondents as to the duty of the Court to consider the wishes of the wife disappears. If, however, this declaration of the wife that she was not willing to return to her husband were true, then we would have to consider what the duty of the Court is. Whilst it is quite unnecessary, in our view of the circumstances, to consider that position, we must state that we consider that in the case of a girl of only 13 years of age her consent or otherwise is quite immaterial. What we would have to consider would be the welfare of the minor wife and in doing so the fact that she prefers to reside elsewhere than with her husband, although had she been old enough to form a good opinion, this would have been a very important circumstance for consideration, would not in our view be entitled to very much or any weight at all. We have also come to the conclusion that the assertion that she was ill-treated when she was residing under her husband's roof is a pure invention. The only evidence with

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regard to this is the statement of the young wife herself which, for the reasons we have already stated, we decline to attach any weight to and that of her mother, the first respondent, who professes to have been an eye-witness of it. But there is this important fact to be considered. In the affidavit which was sworn to on the first respondent's behalf by the second respondent no allegation whatever is made that the young girl was beaten or kicked by her husband. The only reference to this occurs in the affidavit of the second respondent and he does not profess to have been an eye-witness of it and is therefore entirely hearsay. We do not think that, had this young girl been subjected to ill-treatment, she would have been allowed, even accepting the respondents' case, to have gone back again to her husband, nor do we think it in the least bit likely that either of the respondents would have been anxious that she should return to him as they say they are. The whole case appears to us to be a pure concoction and we shall dismiss that charge of cruelty as being entirely untrue. We have to consider the welfare of the minor and in this connection we are bound to say that we think that it is to the advantage of this young girl that she should return at the earliest possible moment to her husband, who is a well-to-do man, a Bachelor of Arts, a Sub-Registrar, and, so far as we can see, perfectly respectable. It must always be to the advantage of a wife to return to her husband and it is very difficult to believe that Hindu parents of a young wife would ever consider that it was better for her to remain with them than to go to her husband after she has attained puberty. It is not necessary for us to consider why it is that the respondents have kept this girl from her husband. But there is evidence, which we think we are entitled to rely on, that the respondents attempted to make terms upon which this young girl would be allowed to return to her husband. There is the evidence of Chinnaswami Goundan, who is a relation of the respondents and also a connection by marriage of the petitioner and who lives next door to the respondents, that the respondents were demanding Rs. 5,000 and some lands as a condition for allowing the girl to return to her husband. We think that it is most probable that that correctly represents the facts. It was pressed upon us on behalf of the respondents that this was most unlikely because at the time of the marriage the respondents could have insisted as a condition for giving their permission to the petitioner to marry this young girl on the payment of a very substantial sum of money. Although in some cases this no doubt would be a very cogent argument, we think that

in this case no such terms were exacted, because the respondents were anxious that this girl should marry the petitioner and therefore did not want to risk the marriage going off by insisting upon onerous terms.

Another argument addressed to us, which seems to us to have no force at all, was that the proceedings under section 491 of the Criminal Procedure Code were not the appropriate ones. On the facts of this case, it was argued that the relief should have been sought under the Guardians and Wards Act which would not have put upon the respondents the expense that these proceedings have done, because the enquiry could have been had locally and therefore been less expensive than this. It is said that by adopting these proceedings the petitioner has given evidence of his vindictiveness and that he has really used this Court as a means of extortion, that is to say, by bringing these proceedings he has, as it were, exercised an unfair pressure on the respondents. This is an argument which we cannot accede to. We are very far from saying that, in a case such as this, the remedy of the husband could be under the provisions of the Guardians and Wards Act, but it is not necessary for us to express an opinion beyond saying that we think it is very doubtful. Even assuming that that remedy were open to the petitioner, it is clear that the remedy under section 491 of the Criminal Procedure Code is one which is open to the petitioner and the respondents cannot be heard to say that where there is a remedy provided by law, that should not be resorted to, because there is another remedy less expensive and less threatening. Bacon, V.C., in *Bryant* v. *Bull*,[1] when he had to deal with a similar argument, said that it did not matter how many remedies were open to a person, there might be 5,000; he was entitled to avail himself of any one of them and that what had to be shown was that the remedy that he did avail himself of was not open to him. It is quite clear that the petitioner is entitled to come here under section 491 of the Criminal Procedure Code. We are satisfied that there is no force in the argument addressed to us.

Another argument put forward was that the wife had not been illegally detained. This, of course, was founded on the assertion that she consented to live with the respondents and is unwilling to return to her husband. As we have already expressed the view that she is not unwilling to return to her husband, much of the force of this argument is lost. But it is quite clear from *Abraham* v. *Mahtabo*[2] that even if a minor does con-

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1 (1878) 10 Ch.D. 153. 2. (1889) I.L R. 16 C. 487.

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sent and remains in the custody of those who are charged with illegally detaining her that does not matter, but the persons who keep her even with her consent are to be held to have illegally detained her if a person who is better entitled in law to have the custody of that person desires to have that custody. That was a case under section 552 of the Criminal Procedure Code, but we think that the reasons given for deciding the case in that way are equally applicable to the facts of this case.

Under these circumstances we find that the petitioner is entitled to have the order he asks for. We direct the respondents to hand over the minor wife to his custody. The wife will be handed over now in Court to her husband.

N.S. *Custody ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON AND MR. JUSTICE REILLY.

The Secretary of State for India in Council represented by the Collector of Godavari .. *Appellant** (*Deft.*)

v.

Damisetti Surayya and another .. *Respondents* (*Plffs.*).

The Secretary of State for India v. Surayya.

Madras Irrigation Cess Act (VII of 1865), S 1 Proviso—River tidal and navigable on the northern portion—Southern portion too shallow to permit of navigation or too high for tides during dry season—Effect—Riparian rights—Owner of an island in the river—Rights of—Natural right to take water for irrigation from river belonging to Government—Levy of water cess by Government—Legality

The fact that the navigable and tidal channel of a river lies on the northern portion of the river and that, within the main banks to the south of this channel in the dry season is a medley of land and water, lanka and paya which are too shallow to permit of navigation or too high to be covered by tides, does not make the river a non-tidal and non-navigable one at the southern portion

It is not necessary that an owner should occupy land on one of the main banks of a river in order to enjoy the privileges of a riparian owner, the banks of an island in a river are for all practical purposes equally riparian and the owner of the island possesses the same riparian rights as the owner of either main bank.

A riparian owner of land abutting a river belonging to Government has got a natural right to use its water for irrigation purposes and consequently the Government has no right to charge water cess in such a case.

Second Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in Appeal Suit No. 46 of 1924 (A.S. No. 59 of 1924 on the file of the District Court, Goda-

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*S.A. No 872 of 1925 16th November, 1928.

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vari) preferred against the decree of the Court of the District Munsif of Amalapuram in Original Suit No. 774 of 1921.

The Government Pleader for appellant.

N. Rama Rao for respondents.

The Court delivered the following

JUDGMENTS *Jackson, J.*—Plaintiffs sue for a declaration that the defendant, the Secretary of State, has no right to charge water-cess in respect of certain lands belonging to the second and cultivated by the first plaintiff.

Jackson, J.

The plaint sets forth that these lands are zamindari ryoti situated in Veeravallipalam village, near a channel known as Togarapaya; if it be found that water was taken for irrigation purposes from this channel, then it is water which does not belong to Government and to which plaintiffs' land has a natural right (Para. 5-*b* of plaint).

The defendant denied that the channel was ryoti, claiming that it was part of the river Godavari, where it is both tidal and navigable, the water therein belongs to Government and plaintiffs have no natural right.

There is no precise sketch of the locality, possibly because no precision can be guaranteed. The lands admittedly lie between the flood banks of the northern branch of the Godavari delta, and when the waters annually subside, the striation of soil and water left in the river-bed presumably is not of unvarying pattern. This circumstance in our opinion does not materially affect the questions which we have to decide.

The learned District Munsif found that water had been taken for irrigation as stated by the defendant (Issue IV) and that the channel at this spot was non-tidal and navigable only for a portion of the year. Therefore its water does not belong to Government and plaintiffs have a right to take it free of charge (Issue II).

The learned Subordinate Judge on appeal found that the bed of the stream, that is, the Togarapaya, and its banks do not belong to Government. He bases this finding entirely upon the ruling in *Chinnappan Chetty* v. *The Secretary of State for India*,[1] assuming that Togarapaya is an independent river and not part of the Godavari, which is the very fact that he had to decide. One of the grounds of appeal which he overlooked is the third:

"The Lower Court erred in holding that the Togarapaya is a

1. (1918) I.L.R. 42 M 239: 36 M.L.J. 124 (F.B.).

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separate stream distinct from the main river Godavari which extends from flood bank to flood bank."

Moreover, the learned District Munsif has clearly stated in his 28th paragraph:

"The main contention on behalf of Government is that the bed of the river means everything that lies between the two embankments and that the bed of the Paya consequently is portion of a tidal and navigable river."

This is an issue of fact which should have been but has not been determined by the Lower Appellate Court. The materials are all before us, and as nothing will be gained by remanding this suit for a finding, we proceed to determine the question ourselves.

It is found by the District Munsif and not disputed that the Godavari near Veeravallipalam is both tidal and navigable (para. 27). His idea would seem to be that if one takes a lateral section of a river, looking, so to speak, straight across from one bank to another, only that portion which is actually tidal and navigable contains water belonging to Government, while those portions which are too shallow to permit of navigation, or too high to be covered by tides, are in the category of non-navigable streams. A river cannot be divided up in this arbitrary manner. In the dry season, most rivers in India exhibit in their beds as much sand as water, but everything between their banks is none the less the river. Here, the navigable and tidal channel of the Godavari lies, as would seem from Ex. B., on the north; and within the main banks to the south of this channel in the dry season is a medley of land and water, lanka and paya; but it is all the Godavari, and the Godavari at a point where it is a navigable river. The same question has been raised in connection with the Ganges. Has a man with fishery rights in the river to confine his operations to the actual main stream, or may he also fish in a detached channel which is only part of the main stream during the annual floods. That he may is ruled in *Jogendra Narayan Roy* v. *Crawford.*[2] We find therefore that the Togarapaya is part of a tidal and navigable river and *Chinnappan Chetty* v. *The Secretary of State for India*[1] has no direct application to this suit because it deals with a non-navigable non-tidal river. It is admitted that the water of a tidal and navigable river belongs to Government and so the finding that the Godavari at the suit locality is a navigable and tidal river attracts the provision in section 1-*a*, Madras Act VII of 1865:

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1 (1918) I.L.R. 42 M. 239: 36 M.L.J. 124 (F.B.).
2. (1905) I.L.R. 32 C. 1141.

> "Whenever water is used for purposes of irrigation from any river belonging to Government, it shall be lawful for Government to levy a cess for such water"

In order to avoid this statutory provision it would be necessary for the plaintiffs to plead the benefit of the proviso to S. 1, that by virtue of an engagement with Government they are entitled to free irrigation, or to plead that they have a natural right to the water unaffected by the Statute.

They did state that the land in question was ryoti, and this has not been traversed in the defendant's written statement, but it does not appear that they pleaded any engagement at the time of the Permanent Settlement, express or implied, so that this question does not arise in the present suit. But they pleaded a natural right in para. 5-*b* of the plaint, which is denied in para. 3 of the written statement. It may be assumed that such right, if it existed, remained intact, whether the land was granted at the original settlement, or subsequently, as contended in the lower appellate court. And that such right was not taken away by the Madras Statute Law is laid down by Sankaran Nair, J., in *Sri Rajah Simhadri Raju* v. *The Secretary of State.*[3] To prove that the right exists, the plaintiffs must show that the 2nd plaintiff is a riparian owner, and as such has a natural right to irrigate the land which lies adjacent to the river.

The land is riparian in the sense that as it is an island in the river its margin is washed by the current. The learned Government Pleader argues that in order to enjoy the privilege of a riparian owner, the plaintiffs should be occupying one of the main banks of the river. But the banks of an island are for all practical purposes equally riparian. In *Great Torrington Commons Conservators* v. *Moore Stevens*[4] it was held that a riparian owner cannot claim ownership in a river-bed *ad medium filum* so as to ignore an island in that bed; the line must ordinarily be drawn between the main bank and the island, bisecting the intervening channel. This would seem to imply that the owner of the island possesses the same riparian rights as the owner of either main bank. We find that 2nd plaintiff is a riparian owner.

Then there remains the final question, whether a riparian owner of land abutting a river belonging to Government may claim a natural right to use its water for irrigation. In *Prasad*

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3 (1914) I.L.R. 39 M 67 at 73: 28 M.L.J. 51.

4 (1904) 1 Ch. 347.

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Row v. *The Secretary of State for India*,[5] "the Urlam case," Lord Parker observed that upon such a riparian owner a cess would appear to be leviable, and the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner. In that suit it was found that the Zamindar was entitled to take water by virtue of the Permanent Settlement, and the effect of natural or prescriptive rights was not determined.

The Urlam case has been discussed *obiter* by Sadasiva Aiyar, J., in *Lakshminarasu Avadhanulu* v. *The Secretary of State for India*,[6] a suit to which it could not directly apply because there was no proof of riparian ownership. The learned Judge observes that a riparian owner has a natural right to irrigate his land provided he does not cause material injury to other like owners, and "we should be liberal in recognising irrigational rights as natural rights." In *Subbarayudu* v. *Secretary of State for India*[7] Ramesam, J., in delivering the judgment of the Court, remarks, after citing *Secretary of State for India in Council* v. *Maharaja of Bobbili*,[8] in which the riparian owner was found to have prescriptive rights, at page 976:

> "Whether it is a natural right or a prescriptive right of the riparian owner I do not see what difference it makes. . A riparian right is a natural right . That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubt"

There would certainly seem to be small room for doubt in the face of these authorities. Had the matter come before me as *res integra* I might perhaps question whether the right of a riparian owner in India *ex jure naturae* extends to diverting to his own property water belonging to another person. It is a far cry to reach such a right from the analogy of a riparian owner being entitled to erect a wharf in an English tidal river; the right is conceded in *Lyon* v. *Fish Mongers Company*[9] which is the basic ruling upon which this claim to natural right is founded.

> "Every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle." *Miner* v *Gilmour*[10]

Is irrigation in this Presidency ordinary use? Whatever

5. (1917) L.R 44 I.A. 166 I.L.R. 40 M. 886 at 894: 33 M L J. 144 (P.C).
6. (1917) 34 M.L.J. 223.
7 (1927) I.L.R. 50 M 961: 53 M.L.J. 868
8. (1919) L.R. 46 I.A. 302· I.L.R. 43 M. 529: 37 M.L.J. 724 (P.C).
9. (1877) 1 A.C. 662.
10. (1858) 12 Moo P.C. 131.

academic doubt may be raised, this question in my opinion has been answered by our Court in the affirmative.

I find therefore that the 2nd plaintiff is a riparian owner of property situated upon the bank of a river belonging to Government and has a natural right to use the water of this river for that irrigation for which a cess was levied. The imposition of that cess is not justified by section 1 (*a*) of Act VII of 1865 read in the light of the first proviso, because when Government granted the land they granted along with it the natural rights.

The appeal is accordingly dismissed with costs.

Reilly, J.—Though no detailed map of the land in question or of the Tagarupaya in its neighbourhood has been produced in this case, the general accuracy of the Government survey map of the Amalapuram Taluk has not been disputed before us. That map shows that the Tagarupaya is not in any part of its course an independent river, but that it branches off from the Goutami, the main northern branch of the Godavari, about 10 miles above the land in question, that though it does not flow back into the Goutami, it connects with the Goutami again about 10 miles below the land in question, and that its whole course for those 20 miles and much farther lies between the main stream of the Goutami and its southern flood bank. I agree therefore that we must find that the Tagarupaya is a part of the Goutami. It is undisputed that the Goutami from the point where it comes into existence as a branch of the Godavari until it reaches the sea is a river belonging to the Government within the meaning of section 1 of the Madras Irrigation Cess Act. In taking water from the Tagarupaya for irrigation therefore the plaintiffs were taking water from a river belonging to the Government.

It is undisputed that the land in question is part of an island which has long existed between the Tagarupaya and the main stream of the Goutami and is on the edge of that island adjoining the Tagarupaya. The plaintiffs pleaded that the land was zamindari jiroyati in Viravallipalam village, meaning thereby, as I think we must understand the plaint, that it was part of the Viravallipalam zamindari. That plea was not denied by the defendant in his written statement. It is admitted that there was a permanent settlement in respect of the Viravallipalam zamindari in 1802 or 1803, and we must take it in the circumstances that the land formed part of the zamindari at that time It appears from the evidence that parts of the course

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of the Tagarupaya have changed from time to time, but it has not been suggested before us that it has not flowed immediately next to the land in question from the time of the settlement. Neither party has thought fit to produce the zamindari sanad or a copy of it, and I think from that we may infer that there is nothing in it specifically referring to the irrigation of the land in question or of land within which that land is included. Such a grant, if it had to be construed, it would be our duty to construe strictly against the grantee. But, when we find, as in this case, that land on the bank of an island in a Government river has been settled as part of a zamindari without any particular terms regarding irrigation, in my opinion we must infer that all the ordinary rights of a riparian owner, whatever they may be, were granted to the Zamindar, or recognised, by the settlement. Adopting the view expressed in the closing words of *Subbarayudu* v. *Secretary of State for India*[7] I agree that we must hold that those riparian rights include the right to take a reasonable quantity of water from the Tagarupaya for irrigating the land in question on the edge of the island. That being so, the Madras Irrigation Cess Act gives the Government no power to levy a cess for such irrigation, as the settlement implies an engagement to the contrary within the meaning of proviso 1 to section 1 of the Act. I agree therefore that this appeal must be dismissed with costs.

N.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD BLANESBURGH, LORD TOMLIN AND SIR BINOD MITTER.

Sri Rajah Bommadevara Naganna Naidu Bahadur (since struck out) and another .. *Appellants**

v.

Yelamanchili Pitchayya and others .. *Respondents.*

P. C.

Sri Rajah Bommadevara Naganna Naidu Bahadur v. Pitchayya.

Madras Estates Land Act (I of 1908), S. 12—Trees—Reservation of landlord's right to, by contract in writing prior to Act—Effect of section upon—Landholder's right to trees in case of—Trees vested in tenant by S. 12—Enhancement of rent on ground of—Landholder's right to

On 6th June, 1901, the original plaintiff, the owner of a Zamindari which was an estate within the meaning of the Estates Land Act (Madras), granted to *R* for a term of 10 years, expiring Fasli 1320, a lease of some 1,363 acres of land in a village appertaining to his Zamindari. Prior to the lease in his favour, *R* had no occupancy or other rights in the holding

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*P.C. Appeal No 115 of 1924 1st July, 1929.

7. (1927) I.L.R. 50 M. 961: 53 M.L.J. 868.

P. C.

Sri Rajah Bommadevara Naganna Naidu Bahadur v. Pitchayya.

Upon the holding was an immense belt of paying trees, yielding a substantial revenue. By the lease the Zamindar reserved to himself full rights in regard to all those trees. The lessee was "not in the least to be entitled to them"; as the cist of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the Zamindar dealing with the same. As a matter of fact, those trees during the term continued to be let by the Zamindar to other persons for tapping. The possession of and all rights over the trees remained during the pendency of the lease in the Zamindar, and no payment whatever in respect of them was included in the cess thereby reserved. On a question arising as to whether, notwithstanding the reservation by the Zamindar of his right to the said trees by written contract, the right to use, cut down and enjoy them vested in the lessee and his representatives by virtue of S. 12 of the Madras Estates Land Act, *held*, reversing the High Court, that S. 12 made no distinction in the result between a reservation made by custom and one made by contract, and that the true conclusion was, that where the reservation, however constituted, was conterminous with the previously limited possession, it remained, except with regard to trees subsequently planted by the ryots or naturally grown upon the holding, operative throughout the occupancy made permanent by the Estates Land Act.

There is no provision in the Act enabling the landholder to claim an enhancement of rent or any additional payment for trees on the holding which become the tenant's by virtue of the Act and which are thus lost to the landholder.

Appeal No. 115 of 1924 from the High Court of Judicature at Madras.

Subba Row for appellants.

Dunne, K.C. and *K. V. L. Narasimham* for respondents.

1st July, 1929. The judgment of their Lordships was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—There are two questions raised by this appeal: they both lie within the narrowest compass; the second of them barely survives to come before the Board, so complete has been judicial agreement upon it in India, while the determination of the first, which now alone is serious, depends upon the construction of a few words in a single section of a statute. Yet the plaint in the suit was issued as long ago as the 18th October, 1912, and it is nearly 17 years thereafter that these short questions reach the Board for final determination, and, in the result will now be settled as they were settled by the Revenue Court in India nearly 15 years ago. In the course of the proceedings not only has the plaintiff died, but one of his legal representatives, originally appellant, has dropped out, leaving it to the plaintiff's other representative, the second appellant, by himself to bring his case to a hearing. Not the least important of their Lordships' duties in disposing of the appeal has been the task of determining how the costs thrown away as the result of well-nigh interminable proceedings in India should now be borne.

P. C.

Sri Rajah Bommadevara Naganna Naidu Bahadur v. Pitchayya.

Lord Blanesburgh.

The two appellants are the sons and legal representatives of the original plaintiff, the late Raja of North Vellore. On the 6th June, 1901, the Raja granted to one Ramayya Garu, father of the respondents, for a term of 10 years, expiring Fasli 1320, a lease of some 1,363 acres of land in the village of Narayanapuram. Prior to this lease in his favour, Ramayya Garu had, as it is now agreed, no occupancy or other rights in the holding, which, but for the passing of the Madras Estates Land Act, 1908, would in ordinary course have reverted to the Zamindar on the expiry of the lease.

Of the acres comprised in it some 843 were entered as being in cultivation, and 520 as being dry pasture waste. The annual rental for the whole was fixed at Rs. 1,784-13-0, representing, so far as the "cultivation" lands were concerned, a rent of Re. 0-14-2 per acre, and for the "dry pasture waste" a rent of 8 annas per acre. The lease, however, contained a provision, much relied upon by the appellant in support of his second ground of appeal, that if the lessee raised dry cultivation on the dry pasture waste he had to pay cist upon the land so cultivated at the higher rate of Re. 0-14-2 per acre as well as expenses.

The main, if not the only real, question now at issue between the parties is as to their respective rights in what the District Judge, at one stage of the case, described as an immense belt upon the holding of paying trees—comprising at least 8,000 palmyras and date palms fit for tapping, yielding a substantial revenue, and estimated by a succeeding District Judge to be of a capital value of roughly Rs. 34,000. By the lease the Raja or Zamindar reserved to himself full rights in regard to all these trees. The lessee was "not in the least to be entitled to them"; as the cist of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the Zamindar dealing with the same. And, as a matter of fact, these trees during the term continued to be let by the Zamindar to other persons for tapping at rents yielding for him a substantial revenue. It was not contested before the Board that in these circumstances, the possession of and all rights over the trees remained during the pendency of the lease in the Zamindar, and that no payment whatever in respect of them was included in the cess thereby reserved.

In that state of things and while the lease was still current, the Madras Land Estates Act, 1908, became law. This suit is concerned with the changes by the passing of that Act effected in the relations of the Zamindar as lessor on the one hand, and

the respondents, who by the death of their father had then become entitled to the lease, on the other, in respect of the subsequent property rights, first, in the trees—the important question —and next in the "dry pasture waste," now at all events a subordinate "matter".

It will be convenient to call attention at once to the provisions of the statute relevant to the consideration of these two questions.

In the Act which came into force on 1st July, 1908, "an estate" means amongst other things any permanently settled estate or temporarily settled Zamindari [S. 3 (2) (*a*)]; that is to say, it extends to the estate or Zamindari of the Raja of North Vellore. "Holding" [S. 3 (3)] means a parcel or parcels of land held under a single puttah or engagement in a single village. In other words, the lands included in the lease of 1901 are by that term aptly described. "Ryoti land" means cultivable land in an estate other than private land, but does not include, *inter alia,* tank beds [S. 3 (16)]. "Ryot" means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it [S. 3 (15)]. With these terms so defined section 6 provides that, subject to the provisions of the Act, every ryot then in possession of ryoti land situate in the estate of a landholder shall have a permanent right of occupancy in his holding, while section 9 enacts that no landholder shall as such be entitled to eject a ryot from his holding otherwise than in accordance with the provisions of the Act. S. 12, upon which much turns, is textually as follows:—

"Subject to any rights which by custom or by contract in writing executed by any ryot before the passing of this Act are reserved to the landholder, every occupancy ryot shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding, he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

Section 24 provides that the rent of a ryot shall not be enhanced except as provided by the Act. Section 28: that in all proceedings under the Act the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable until the contrary is proved. Section 30 enables a landlord to institute proceedings for enhancement of rent before the Collector on certain stated grounds and no others. By section 50 (2) every ryot is entitled to call upon his landholder to grant him a puttah for any current revenue year, and every landholder is entitled to call upon his ryot to give him a muchi-

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lika in exchange. The proper contents of the puttah and muchilika are detailed in section 51, and after provision made by section 54 for the tender of a puttah by the landholder, S. 56 provides—and it is under this section that the present suit was instituted—that when a ryot for one month fails to accept the puttah tendered to him and to give a muchilika in exchange, the landholder may sue before the Collector to enforce acceptance of such puttah.

As their Lordships have already observed, the lease of the 6th June, 1901, was still current when the Estates Act came into force. The effect of the statute, as will have been seen, was at once to give to the respondents a permanent right of occupancy in their holding so far as that consisted of ryoti land, and at once to supersede many of the provisions of the lease then current. Notwithstanding this, however, the parties until the expiry of the term apparently allowed their relations towards each other to be regulated by the lease, and it was not until after Fasli 1320, that the Raja tendered to the respondents for the year 1912 a puttah in respect of such part of the original holding as he conceived himself bound to include in it. On the refusal of the respondents to accept the puttah tendered and to execute a proper muchilika this suit was, under section 56 of the Act, brought by the Raja to enforce his statutory rights in these matters.

The refusal of the respondents to accept the tendered puttah was due to the fact that in their view its terms were, mainly in two respects, improper.

First, there were included in it the provisions of the lease already referred to, whereby the trees on the holding were reserved to the landholder, and the respondents objected that, by virtue of section 12 of the Act, the puttah should have left with them the right to use, cut down and enjoy all trees in their holding.

Secondly, there were excluded from the puttah the 520 acres of dry pasture waste which had been included in the lease. The respondents claimed that this acreage should remain part of their holding as being in fact cultivable and therefore ryoti land within the meaning of the Act.

It will be convenient to deal in their order with these two objections to the puttah, showing incidentally how each of them fared in the Courts in India.

First, as to the trees, the Deputy Collector in his judgment of the 17th August, 1914, in the Revenue Court expressed the opinion that, as the Zamindar had reserved his right to them by

written contract, he was entitled, under section 12 of the Act, to continue to reserve the right by the suit puttah, limited, however, to the trees which existed before the Act and not extending to any which might have been planted by the respondents or might naturally have grown upon the holding since its passing. The learned District Judge, on appeal on this point by the respondents, took the same view, and by decree of the 22nd December, 1916, dismissed their appeal from the Collector's judgment.

On further appeal, however, to the High Court at Madras, the learned Judges there took a different view, which they expressed in a judgment of the 22nd April, 1918. Under S. 12 of the Estates Land Act, the tenant, they said, was, subject to custom or written contract, entitled to the trees on payment of rent to the landholder, and in this case the reservation of the trees in the lease held good, but, in their opinion, only for the period of the lease. The reservation was no longer subsisting at the time of the tender of the puttah, and it ought not accordingly to have been retained therein. Other reasons given by one of the learned Judges in support of the same conclusion have not been relied on before the Board, and need not be further alluded to.

In the result the learned Judges of the High Court, thinking that the trees must be included in the holding, but that it was allowable under the Act to charge the respondents with a cist in respect thereof, directed an enquiry to ascertain the proper amount of such cist, and after prolonged and elaborate proceedings to that end, to which for the moment their Lordships do not further allude, the High Court, in a final judgment on the 28th October, 1919, fixed the amount payable by the respondents in this behalf at a single payment of 5 annas in respect of each tree, and in other respects gave effect to their judgment of the 22nd April, 1918. And of all of this the appellant now complains.

The question turns, it will be seen, upon the meaning to be attached to the introductory words of section 12 of the Act:

> "Subject to any rights which by custom or by contract in writing executed by any ryot before the passing of this Act are reserved to the landholder,"

and it may be conceded that, as a matter of first impression, the view of these words taken by the High Court is attractive enough. There is, on the face of them, no obvious reason why the reservation should extend beyond the duration of the contract by which it is made. But this first impression disappears on a closer examination of the clause. The section is certainly dealing with a possession terminable when the Act

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came into force and converted into a permanent right of occupancy by section 6. It is contemplating that as an incident of the terminable possession, rights with respect to the trees on the holding might have been reserved to the landholder either by custom or by contract. It provides that where the reservation is by custom, it, so far as existing trees are concerned, is to remain effective throughout the whole of the occupancy, by the Act made permanent. So much it was conceded in argument was the effect of the section. But if reservation by custom was so long operative, why, so far as the section is concerned, should the result be different when the reservation had been made by contract? A reservation by custom is in this connection surely no more than this, that in places where the custom obtains such reservation is conventional without being expressly made, in contradistinction to places where no such custom exists—as, for example, in the Zamindari of North Vellore, in which case the reservation, if it is to be operative, must be expressed as part of the contract.

But in each case the reservation, when not qualified, will be operative for precisely the same period of time and no longer—that is to say, until, on the expiry of the right to possession by the tenant, the holding reverts to the Zamindar. Accordingly, as might from this point of view be expected, the section makes no distinction in the result between a reservation made by custom and one made by contract, and in their Lordships' judgment, the true conclusion is, that where the reservation, however constituted, is conterminous with the previously limited possession, it remains, except with regard to trees subsequently planted by the ryots or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act.

It would appear that the learned Judges of the High Court came to the conclusion they did in this matter in the belief that it was open to them under the Act to charge the respondents with a suitable payment in respect of the trees which for the first time by virtue of the Act became theirs. At a later stage, however, the learned Judges themselves were less confident of the correctness of this view, which is, as it seems to the Board, mistaken. Their Lordships can find no provision in the Act enabling the landholder to claim an enhancement of rent or any additional payment for his lost trees. Accordingly, if the view of this section taken by the High Court were correct, its effect in the present case must be altogether to deprive the landholder, without any kind of compensation provided, of property of great value, and its effect would be similar in many other cases,

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A construction of the section leading to such a result is not lightly to be entertained, and, in their Lordships' judgment, is not here called for. On this question, therefore, the Deputy Collector, supported by the learned District Judge, reached, in the view of the Board, the true conclusion.

The respondents' second objection to the puttah was the exclusion therefrom of the 520 acres, and this objection can be dealt with more briefly. Upon the evidence taken before him, the Deputy Collector on the 17th August, 1914, found that of the 520 acres in question, some 222 acres were tank-bed land, and that their exclusion from the puttah was, in consequence, justified under the Act. He held, however, in a most careful judgment, that the remaining 297 acres should be included as being "cultivable" land, although it had never in fact been cultivated, and this view of the Deputy Collector, although, so far as it was against them, it has been contested by both parties throughout the Courts in India, has been upheld in all of them. Before the Board the respondents no longer contended that the tank-bed land should be included in the puttah, but the appellant, relying for his contention upon the case of *Sreemantha Raja Yarlagada Mallikarjuna* v. *Subbiah*,[1] still urged that the remaining 297 acres were given only for pasturage and not for cultivation, that, like the tank-bed lands, they should remain excluded from the puttah, the provision of the lease already referred to, which raised the rent per acre to Re. 0-14-2 on the extent cultivated, being meant to serve as a penal rent against the land being improperly used for cultivation purposes. Their Lordships cannot accept this argument. They prefer the explanation of the provision referred to, given by the Deputy Collector, which they give in his own words:

> "The reason why an alternative rate, *i.e*, a lower rate, was conceded in case of non-cultivation was apparently due to the fact that the land was waste before, that it would take some years before it could be reclaimed and brought under cultivation, and that it would be a hardship on the lessee if he were not allowed to pay a favourable rate till then He was not, therefore, required to pay the full rate immediately"

In their Lordships' judgment accordingly this portion of the appellants' appeal entirely fails, and in the result the suit puttah as it was adjusted by the Deputy Collector on the 17th August, 1914, was rightly adjusted, and the subsequent attempts on both sides to have its terms varied have been misconceived.

In that state of things a very serious question arises as to the costs of these attempts. Their Lordships have considered this question very carefully, inquiring how far these costs have

1 (1919) 39 M.L.J 277.

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been occasioned by mistaken views contended for by one side or by the other. For the costs thrown away by the prolonged inquiries to ascertain the proper sum to be paid in respect of what may be called the suit trees, the respondents are mainly, if not entirely, responsible; for the costs thrown away in ascertaining what may again be described as the appealable value of the trees, they were, in the view of the Board, entirely responsible. The increase again in the costs throughout by the appellants' mistaken contention as to the cultivable lands has been relatively slight. In the result their Lordships have reached the conclusion that, no interference being made with the order as to costs in the decree of the Revenue Court of the 17th August, 1914, or in that of the District Court of the 22nd December, 1916, the justice of the case will be met if the respondents pay three-fourths of the subsequent costs incurred by those representing the original plaintiff or his estate, whether in the High Court, in the District Court, or on this appeal.

In the result accordingly their Lordships will humbly advise His Majesty that this appeal be allowed; that the order of the High Court of the 28th of October, 1919, except in so far as it affirms the decree of the District Court of the 22nd December, 1916, be discharged, and that the last-mentioned decree be restored.

The respondents must pay the costs already specified.

Solicitors for appellants: *Chapman, Walker & Shepherd.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. ——— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of New Brunswick (Appeal Division).]

PRESENT:—THE LORD CHANCELLOR, LORD CARSON, LORD BLANESBURGH, LORD ATKIN AND LORD TOMLIN.

The Maine and New Brunswick Electrical Power Company, Limited .. *Appellants**

v.

Alice M. Hart .. *Respondent.*

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Interest Act (XXXII of 1839), *S.* 1—*Sum certain payable by written instrument at certain time—Payment contingent upon events which may or may not happen if included—Interest—Equitable right to—Condition—Contract executed—Suit on covenants and not on—Right to interest in case of.*

A sum certain is not payable by the written instrument at a time certain, within the meaning of S. 1 of the Interest Act (XXXII of 1839), if its payment is contingent upon events which may or may not happen

*P.C. Appeal No 78 of 1928. 13th May, 1929.

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So held on a construction of S. 24 (1) of the New Brunswick Judicature Act, 1909 (identical in terms with S. 28 of Lord Tenterden's Act, 3 and 4 Will. IV, c 42 and S 1 of the Indian Statute).

In order to invoke a rule of equity entitling a party to interest, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance.

When once such a contract has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction and the parties are left to their remedies at law.

Where a party cannot, and does not, sue upon the contract, because it is fully executed, and he sues only upon the covenants, those covenants must be construed according to the ordinary rules of construction, and if they do not, so construed, give the plaintiff interest, he cannot claim interest unless it is given to him at common law or under statute. There is no place in the matter for the exercise of equitable jurisdiction and, therefore, no rule of equity in regard to interest can have any application.

Appeal No. 78 of 1928 from the Supreme Court of New Brunswick (Appeal Division).

G. Lawrence and *W. H. Harrison* for appellants.

F. R. Taylor for respondent.

13th May, 1929. Their Lordships' judgment was delivered by

Lord Tomlin.

LORD TOMLIN.—In this case the defendants in the action are appealing from a judgment of the Appeal Division of the Supreme Court of New Brunswick, dated the 26th March, 1928. By that judgment the Appeal Division (1) dismissed an appeal of the defendants from a judgment against them for $28,000 without interest, given by the King's Bench Division of the Supreme Court of New Brunswick, on the 20th October, 1927, and (2) allowed a cross-appeal of the plaintiff, thereby increasing the amount recoverable against the defendants by $9,083.88 in respect of interest.

Two questions only have been argued on this appeal. First, whether upon the true construction of certain covenants the defendants have become liable for the $28,000 for which judgment has been given against them. Secondly, whether the defendants are chargeable with interest on any sum which they may be held liable to pay under the covenants.

The facts of the case are as follows:—

Prior to the year 1905, the plaintiff's predecessor-in-title, Havelock McC. Hart, acquired land partly in New Brunswick and partly in Maine, on both banks of the Aroostook River in the neighbourhood of the Aroostook Falls, together with certain water privileges for the purpose of developing the water power of the Falls.

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In 1905, Hart and one Arthur R. Gould (the owner of all the capital stock of the Presque Isle Electric Light Company) entered into an agreement with the defendants whereby Hart was to transfer all his land and water privileges on the Aroostook River to the defendants and Gould was to transfer to the defendants all his capital stock in the Presque Isle Electric Light Company. The consideration to Hart for the transfer by him of the land and water privileges was (1) the allotment or transfer to him of certain stock of the defendants and (2) the defendants' covenants, the true construction of which falls to be determined upon this appeal. The documents relating to the transaction do not contain any reference to the stock to be allotted or transferred to Hart, but it is not disputed that it was part of the bargain that Hart should have the stock and that the stock was, in fact, allotted or transferred to him upon the execution of the indentures of conveyance completing the transaction to which reference will be made hereafter.

The first relevant document is a memorandum of agreement, dated the 3rd January, 1905, and made between Hart, Gould and the defendants. It contained a recital that under arrangements which had been mutually made between them, Gould was to transfer to the defendants all the capital stock of the Presque Isle Electric Light Company, and Hart was to convey or cause to be conveyed to the defendants by deeds in the form thereto annexed as Schedules A and B the lands and water privileges described in the said schedules, being the lands and water privileges already referred to.

The operative part of the agreement provided that upon the defendants completing the necessary financial arrangements for the development of water power at the Aroostook Falls to the satisfaction of Gould and Hart, Hart should and would convey or cause to be conveyed to the defendants by deeds in the form thereto annexed as Schedules A and B the lands and water privileges described therein and Gould should and would assign and transfer or cause to be assigned and transferred to the defendants all the capital stock of the Presque Isle Electric Light Company.

The stock of the defendants to be allotted or transferred to Hart was duly allotted or transferred to him.

The conveyance of the lands and water privileges by Hart to the defendants was also in due course effected by means of two indentures of conveyance, dated the 13th January, 1905, one of which related to the lands and water privileges in New Brunswick and the other to the lands and water privileges in Maine.

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The two indentures were *mutatis mutandis* identical in form. Each of them contained a covenant by the defendants with Hart in the following words:—

"The said The Maine and New Brunswick Electrical Power Company, Limited, doth hereby for itself, its successors and assigns covenant with the said Havelock McC Hart, his heirs, executors, administrators and assigns that if water power to a greater extent than two thousand horse power be at any time developed and used at the Aroostook Falls, situate upon the hereinabove described lands and premises, the said The Maine and New Brunswick Electrical Power Company, Limited, its successors and assigns shall pay to the said Havelock McC. Hart, his heirs, executors, administrators and assigns the sum of eight dollars for each horse power in excess of the said two thousand horse power, any power developed and used in excess of two thousand horse power to be treated as divided into units of 500 and each unit to be immediately paid for in entirety when any part thereof has been developed and used"

By deed of assignment, dated the 21st August, 1923, Hart assigned all his rights under the covenants contained in the indentures of conveyance and all moneys payable thereunder to the plaintiff.

After the completion of the sale and transfer of the lands and water privileges the defendants erected works at or near the Aroostook Falls for the purpose of developing the water power of the Falls, and began and have since continued to generate electrical power therefrom for distribution and sale to customers. The defendants have from time to time increased the capacity of their works.

It appears from the power station sheets of the defendants in which is entered an hourly record of the amount of power produced, that the defendants for the first time on the 10th January, 1918, and on several subsequent occasions developed and used power in excess of 2,000 horse. The action out of which this appeal arises was begun by the plaintiff to recover the sums payable under the covenants in respect of such excess horse power.

The plaintiff contends that upon the true construction of the covenants the defendants are liable to pay for excess horse power immediately upon each occasion where any excess horse power is developed and used, in other words, that the defendants are chargeable from time to time upon the maximum peak load once reached. There is no dispute as to the figures and if the plaintiff's contention is well founded, judgment was rightly given against the defendants for $28,000.

The defendants, however, contend that "water power" of a stream means the average power produced over a reasonable period of time, and that in view of the fluctuations of the seasons, the most reasonable period of time is a year, and that,

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therefore, on the true construction of the covenants they ought to be charged upon the average load of the year and not upon the individual maximum peak loads.

Both Courts below have decided this point against the defendants.

In their Lordships' judgment the contention of the defendants cannot be reconciled with the language of the covenants. The words "at any time" and "immediately" contained in the covenants seem to their Lordships to indicate recurring points of time and not any system of averaging. Further, the similarity between the language under consideration in the present case, and that considered by their Lordships' Board in the case of the *Attorney-General for Ontario* v. *Canadian Niagara Power Company*,[1] is such that a decision in favour of the defendants here would, in their Lordships' view, be inconsistent with the earlier decision of the Board.

Upon the point of construction, therefore, in their Lordships' opinion, the defendants fail.

The question of interest next falls for consideration. On this head of the case the Appeal Division of the Supreme Court, differing from the Trial Judge, have allowed interest against the defendants.

There is no agreement to pay interest, either in express terms or implicit in the language of the covenants. The plaintiff, however, contends that interest is payable either under section 24 (1) of the New Brunswick Judicature Act, or under the rule by virtue of which a Court of Equity compels a purchaser who takes possession to pay interest. The Appeal Division in deciding in the plaintiff's favour have founded themselves upon section 24 (1) of the New Brunswick Judicature Act.

The language of section 24 (1) of the New Brunswick Judicature Act, 1909, is as follows:—

"On the trial of any issue or any assessment of damages upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable"

The language of this section cannot be distinguished from that of section 28 of Lord Tenterden's Act (3 & 4 Will. IV, c. 42). The English decisions on that section are, therefore, relevant for guidance. In their Lordships' judgment, the decision of the Exchequer Chamber in *Merchant Shipping Company* v. *Armitage*[2] is an authority binding the English Courts up to

1. (1912) A.C. 852.
2 (1873) 9 Q.B. 99.

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and including the Court of Appeal to hold under Lord Tenterden's Act that if the sum becomes payable at a time fixed by reference to a contingent event which may or may not happen, it is not payable by the written instrument at a time certain. This decision was treated as authoritative by the Court of Appeal in *London Chatham and Dover Railway Company* v. *S. E. Railway Company*[3] and was viewed with benevolence by Lord Herschell in the House of Lords (see *London Chatham and Dover Railway Company* v. *S. E. Railway Company*.[4])

It is further to be observed that in *Juggomohun Ghose* v. *Manickchund*[5] their Lordships' Board held under an Indian statute (Act No. XXXII of 1839) identical in terms with the relevant section of Lord Tenterden's Act that a sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed.

In view of the last-mentioned decision, which is binding on their Lordships' Board, it would not, in their Lordships' judgment, be open to them to hold that the effect of section 24 (1) of the New Brunswick Judicature Act is different from that of the section of the Indian Statute under consideration in *Juggomohun Ghose* v. *Manickchund*.[5] The defendants' contention that section 24 (1) of the New Brunswick Judicature Act has no application to the present case must, therefore, prevail.

It remains to consider whether any rule of equity entitles the plaintiff to interest.

In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance.

It must, however, be borne in mind that when once such a contract has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction and the parties are left to their remedies at law.

In the case under consideration the contract for the sale of the lands and water privileges has been fully executed. Hart

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3 (1892) 1 Ch. 120, 121 4 (1893) A.C. 429 at 435.
5 (1859) 7 Moo I A. 263

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conveyed the property purchased to the defendants. He received from the defendants the stock to be transferred to him, and he accepted from the defendants, as under the contract he was bound to do, covenants under seal to perform certain obligations of a continuing character involving the payment from time to time of sums of money. Upon the stock having been allotted or transferred to Hart and the covenants having been executed, Hart had received all the consideration moving from the defendants to him under the contract. The plaintiff, as Hart's successor-in-title, cannot, and as appears from her statement of claim, does not sue upon the contract, which is fully executed: she sues upon the covenants. Those covenants must be construed according to the ordinary rules of construction; and if so construed, they do not give the plaintiff interest, she cannot claim interest unless it is given to her at common law or under statute. There is no place in the matter for the exercise of equitable jurisdiction and, therefore, no rule of equity in regard to interest can have any application.

In their Lordships' judgment, the plaintiff's cross-appeal for interest to the Appeal Division of the Supreme Court of New Brunswick ought to have failed and to have been dismissed with costs.

In the result, therefore, the defendants succeed on the present appeal to the extent of the judgment against them for interest, but otherwise the appeal fails and their Lordships will humbly advise His Majesty accordingly.

There will be no costs of this appeal.

Solicitors for appellants: *Wm. A. Crump & Son.*

Solicitors for respondent: *Lawrence Jones & Co.*

K J.R. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR JUSTICE ANANTAKRISHNA AIYAR.

Muthuvira Reddi Rami Reddi and others .. *Appellants** *(Defendants)*

v.

Mayandi Venkatesa Mudali, Receiver, impleaded as a party respondent by Order, dated 9th November, 1928, on C.M.P. No. 3546 of 1928 and others .. *Respondents* *(Plaintiffs and respondents).*

Muthuvira Reddi v. Venkatesa Mudali.

Receiver—Termination of litigation in which he was appointed—Absence of order discharging him from receivership—Court which appointed

*S.A. Nos 348 to 381 of 1925. 29th July, 1929.

him closed for summer holidays—Locus standi *to prefer an appeal against an adverse order—Competency of such appeal—Madras Estates Land Act, S. 26 (3)—"Person entitled to the rent"—Meaning of—Receiver empowered to file suit for enforcement of pattah—Dismissal of subsequent application by ryots to cancel the order empowering the Receiver—Receiver, if can be said to be a "person entitled to the rent."*

Where a suit to recover possession of a zemin village was dismissed by the Trial Court and in the appeal preferred by the plaintiff against the said decree the High Court appointed a Receiver in respect of the suit village and the appeal preferred by the defendants to the Privy Council against the decree of the High Court passed in favour of the plaintiff was allowed on 21st May, 1922, dismissing the plaintiff's suit, and the Receiver who had sued for enforcement of pattah on a ryot of the zemin village and whose suit had been decided against him preferred an appeal against that decision on 12th June, 1922,

Held, that, as the Receiver had not been discharged on or before 12th June, 1922 by the Court which appointed him and as the time for preferring the appeal would expire before the High Court which appointed him could be moved to pass orders on the re-opening of the High Court in July, 1922, the Receiver had *locus standi* to prefer the appeal on that date and that therefore the appeal was competent

Where a Court has granted permission to the Receiver under O 40, Rule 1 (1) (*d*) of the C.P. Code to file a suit for enforcement of pattah under the provisions of the Madras Estates Land Act and dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of such a suit, the Receiver is a "person entitled to the rent" within the meaning of S 26 (3) of the Madras Estates Land Act

Swaminatha Odayar v. *Sundaram Aiyar,* (1920) I.L.R. 44 Mad. 274: 39 M.L.J. 711 distinguished

Second Appeals against the decrees of the District Court of Chittoor in Appeal Suits Nos. 261, 262, 269, 270, 271, 273, 275, 276, 279, 281, 282, 283, 284, 286, 288, 289, 290, 296, 298, 303, 304 to 306 and 314 to 317, 321, 322, 323, 327, 331, 337 and 340 of 1922 preferred against the decrees of the Court of the Special Deputy Collector of Chandragiri in Summary Suits Nos. 1800, 1801, 1815, 1816, 1817, 1820, 1824, 1825, 1828, 1831, 1832, 1833, 1835, 1840, 1843, 1844, 1846, 1855, 1858, 1865, 1868, 1869 of 1920 and 2131, 2140, 2142, 2143, 2144, 2148, 2149, 2150, 2155, 2159 of 1921 and 1819 and 1847 of 1920.

L. A. Govindaraghava Aiyar and *S. A. Seshadri* for appellants.

S. Ramaswami Aiyar, T. Kumaraswamiah and *S. Ramanujachari* for respondents.

The Court delivered the following

JUDGMENT. *Second Appeal No.* 348 *of* 1925.—The defendant is the appellant in this Second Appeal. The Receiver of Melappudi Village sued for enforcement of pattah on the de-

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fendant, a ryot of the village. There was the usual dispute between the parties as to what the proper terms of the pattah should be. The defendant's plea was that one Subbaraya Pillai, who, it was alleged, was owner of the suit village, agreed with the defendant to commute the rents into a fixed money rent permanently and once for all, and issued pattah in Fasli 1328 embodying the rates agreed upon. The Special Deputy Collector of Chandragiri Division who tried the summary suit upheld the contention of the defendant and came to the conclusion that the proper rates of rent were the cash rates and that the commutation was *bona fide* and binding on the plaintiff. He accordingly directed that the pattah should be amended by insertion of the cash rates as contended by the defendant.

On plaintiff's appeal, the learned District Judge of Chittoor disagreed with the findings of the first Court and held that the rates in the tendered pattah were the proper rates, and he directed the defendant to accept the tendered pattah and execute a muchilika in exchange with similar terms.

The defendant has preferred the second appeal and on his behalf it was first contended that the appeal to the Lower Appellate Court filed by the Receiver was incompetent. To appreciate the contention it is necessary to state that the Rajah of Karvetnagar had filed a suit to recover possession of the suit village among others, that in the appeal preferred by him to the High Court against the decree of the Subordinate Judge of North Arcot dismissing the suit, the High Court appointed a Receiver in respect of the suit village, and that on an appeal preferred by Subbaraya Pillai and others to the Privy Council against the decree of the High Court passed in favour of the Rajah of Karvetnagar, the Privy Council on 21st May, 1922, reversed the decision of the High Court and dismissed the Rajah's suit on the ground that the suit was barred by the Law of Limitation.

The appeal to the Lower Appellate Court was presented by the Receiver on 12th June, 1922. The appellant contends that as soon as the Privy Council dismissed the suit on 21st May, 1922, the receivership came to an end and that the Receiver had no *locus standi* to prefer the appeal on 12th June, 1922. We are unable to accept the contention. The Receiver had not been discharged by the Court which appointed him and time for preferring the appeal would expire before the High Court which appointed the Receiver could be moved to pass orders on the reopening of the High Court, in July, 1922, and in the circum-

stances we think that the Receiver's appeal could not be said to be incompetent as contended by the appellant. We accordingly overrule this objection.

The next objection raised by the appellant was that Subbaraya Pillai was the owner of the suit village and that the commutation arrangement made by him with the ryot was *bona fide* and binding on the plaintiff and that the proper rates of rent are the cash rates agreed to between Subbaraya Pillai and the ryot. The respondent in answer to this contention relied on section 26, sub-section (3) of the Madras Estates Land Act, under which no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder, if such rate is lower than the lawful rate payable by the ryot before the date of the grant upon the land. The finding of the Lower Appellate Court is that the new rates fixed by Subbaraya Pillai are lower than the rates payable by the ryot before. As the present case is not sought to be brought within the exception contained in sub-section (1) of the section, it is clear, having regard to the admitted fact that Subbaraya Pillai died before the Fasli in respect of which the present suit was brought, that the rates of rent agreed to by Subbaraya Pillai would not be binding upon the person entitled to the rent after the death of Subbaraya Pillai It was however argued by the learned Advocate on behalf of the appellant that it could not be said that the Receiver was "a person entitled to the rent" within the meaning of the sub-section. Having regard to the definition of "landholder" in section 3, clause (5) of the Estates Land Act, and having regard to the fact that the Court granted permission to the Receiver under Order 40, Rule 1 (1) (*d*) of the Code of Civil Procedure to file these suits, and also dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of these suits, we think that the plaintiff—the Receiver—comes within the provisions of sub-section 3 of section 26 of the Estates Land Act. The decision in *Swaminatha Odayar* v. *Sundaram Aiyar*[1] relied on by the appellant is distinguishable, as it turned on the wordings of section 46 of the Estates Land Act, sub-section (5) of which specifically provides that sums payable under that section for the acquisition of occupancy rights shall be paid to the landholder who is the owner of the Estate, and any application or proceeding under the section shall be made only to or against

1. (1920) I.L.R. 44 M 274 39 M L.J. 711.

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such landholder. The Court accordingly held that the application by a non-occupancy ryot under section 46 of the Act could be made only to the *'owner'* of the Estate, and not to the Receiver in charge of the Estate. The word *'owner'* does not occur in section 26, which is the section with which we are here concerned.

On the merits the Lower Appellate Court held that Subbaraya Pillai was not the sole proprietor of the village, that he was only one of the legal representatives of the deceased Saravana Pillai, and that the other legal representatives did not join Subbaraya Pillai in the act of commutation of rents relied on by the ryots. It also held that Subbaraya Pillai was in needy circumstances at the time, that the new rates fixed by him fell short of the old rates and that "there was no evidence as to the circumstances under which a lower set of rates was charged by Subbaraya Pillai," and further that "the grounds on which the so-called commutation was made were not really tenable and that they were hardly real."

We think that the learned District Judge's findings, being findings of fact, should be accepted by us in Second Appeal.

We hold that under section 26 (3) of the Estates Land Act the rates fixed by Subbaraya Pillai are not binding on the Receiver, who represents the proprietor of the village.

We accordingly dismiss the Second Appeal with costs.

Second Appeals Nos 349 to 381 of 1925 follow.

We fix the pleader's fee payable to the respondents in these Second Appeals at the consolidated amount of Rs. 250 and direct that the same be apportioned equally among the appellants in those appeals. Rs. 100 out of the costs to go to the 1st respondent and Rs. 150 to the other respondents.

These second appeals coming on for hearing, this day, having been set down to be spoken to, on the question of costs, the Court made the following

ORDER —The above order has to be modified, as the 1st respondent is a party for only one of the appeals. He will get Rs 35 and the other respondents Rs. 211-8-0.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTAKRISHNA AIYAR.

Onthath Sabju Sahib .. *Appellant** (*Deft.*)

v.

The Malabar District Board .. *Respondent* (*Plff.*).

Onthath Sabju Sahib *v.* The Malabar District Board.

Malabar Compensation for Tenants' Improvements Act (I of 1900)—Scope and applicability—Temporary lease of roadside poramboke land—If governed by the Act—S 3 (3)—Improvement—Temporary lease of roadside poramboke land by District Board—Condition that lessee should surrender possession without claiming value of any improvements that might be made by him—Erection of substantial buildings by the lessee—Whether an improvement—Crown Grants Act (XV of 1895)—Applicability to such lease.

The Malabar Compensation for Tenants' Improvements Act applies only to improvements effected to agricultural holdings and vacant *kudiyiruppu* building sites and has no application in the case of roadside poramboke

Chathukutty v. *Kunhappu,* (1927) I.L.R. 50 M. 813: 53 M.L.J. 224 followed

Where a land forming part of roadside poramboke was leased by the District Board temporarily on the specific condition that the lessee should deliver back possession of the leased land without claiming any compensation for improvements of any sort that he might make on the property, the erection of substantial buildings on the land by the lessee is not an "improvement" within the meaning of S 3 (3) of the Malabar Compensation for Tenants' Improvements Act as it would be inconsistent with the purpose for which the land was let

Obiter: The Crown Grants Act does not apply to such a lease of roadside poramboke land by the District Board.

Second Appeal against the decree of the District Court of North Malabar in Appeal Suit No. 88 of 1927 preferred against the decree of the Court of the Principal District Munsif of Badagara in Original Suit No. 565 of 1925.

M. C. Sridharan for appellant.

V. P. Karunakaran Nambiar for respondent.

The Court delivered the following

JUDGMENT.—On the 12th March, 1923, the District Board of Malabar passed proceedings permitting the President of the District Board to lease a particular roadside poramboke vested in the District Board for occupation by the present defendant. The proceedings made it a condition for allowing such temporary occupation that the applicant should pay a sum of Rs. 6 a year and that he should deliver back possession of the plot without claiming any compensation for improvements of any sort that he might make on the property. On such conditions the President, District Board, Malabar, leased to the defendant

*S.A. No 614 of 1928. 15th August, 1929.

Ohthath Sabju Sahib v. The Malabar District Board.

the roadside poramboke on the 4th April, 1923, as per Ex. A. Subsequently, as it was resolved to take possession of the property, a notice to quit, Ex. B, was served upon the defendant on the 7th May, 1925, requiring him to quit the premises and deliver possession to the District Board. The defendant not having done so, the President, District Board, Malabar, has instituted the suit which has given rise to this Second Appeal to recover possession of the property. The main plea of the defendant was that he was entitled to be paid the value of the improvements effected by him on the property before surrendering possession, and he relied on the provisions of the Malabar Compensation for Tenants' Improvements Act. The District Munsif of Badagara, who tried the suit, was of opinion that the provisions of the Crown Grants Act (XV of 1895) applied to the case and accordingly came to the conclusion that the rights of the parties should be adjudicated according to the tenor of the document. The document being specific on the point that the defendant should not claim the value of any improvements that he might make on the property, the District Munsif came to the conclusion that the plaintiff was not bound to pay anything in respect of the improvements. The defendant preferred an appeal to the Lower Appellate Court and the learned District Judge of North Malabar differed from the District Munsif as regards the applicability of the Crown Grants Act to the case in question. He, however, was of opinion that Malabar Act (I of 1900) did not apply to the present case, because the present case related to a road margin in the heart of Badagara bazaar, by the side of the principal public offices and at the junction of three roads, and he was accordingly of opinion that the land in question could not be said to be an agricultural holding within the meaning of the Malabar Act. The learned District Judge also relied on a decision of this Court reported in *Chathukutty* v. *Kunhappu*,[1] where the learned Judge, Jackson, J., held that Malabar Act (I of 1900) applies only to improvements effected to agricultural holdings and vacant *kudiyiruppu* building sites. The learned District Judge was of opinion that the roadside poramboke in question which was leased to the appellant could not be said to be an agricultural holding or a building site (*kudiyiruppu*) available for purposes of being built upon. It was roadside poramboke proper, and as the same was not required immediately for any purpose by the District Board, it was thought that it may be leased to the defendant temporarily, but on the specific terms and conditions mentioned

1. (1927) I.L.R. 50 M. 813 · 53 M L.J. 224.

Onthath Sabju Sahib v. The Malabar District Board.

in the lease. The learned District Judge (Mr. A. V. Govinda Menon) observed as follows in paragraph 2 of his judgment:

"It would be a perversion of common sense to hold that when, as here, in an urban area like Badagara, a tenant agrees to occupy a road margin for a short term and agrees with the District Board (in which the road is vested) to go away whenever called upon, without claiming anything for any fixture he might erect upon the site, such a contract comes within the mischief attempted to be struck at by the Improvements Act."

The defendant has preferred this Second Appeal and on his behalf it was argued by his learned Advocate that the decision of this Court referred to by me, viz., *Chathukutty* v. *Kunhappu,*[1] requires reconsideration. The learned Advocate submitted that the policy of the Malabar Compensation for Tenants' Improvements Act was to encourage the making of improvements in respect of all kinds of properties in Malabar, and that there was nothing in any of the provisions of the Act which restricted the scope of the Act to agricultural lands or vacant *kudiyiruppu* building sites as mentioned in that decision. The learned Advocate accordingly submitted that that decision should be reconsidered as the question related to a matter of great importance in Malabar. On the other side, the learned Advocate who appeared for the District Board drew my attention to the definition of tenant in section 3 of the Act, where reference is made to "cultivation" and "to cultivate". But I am inclined to think on a reading of sub-clause (1) of section 3 as a whole, that the natural construction is to limit those words to the case of "waste lands'' mentioned in the last portion of the sub-section.

Then it was argued that there were decisions under the prior Act of 1887 to the effect that the Act did not apply to the case of buildings in towns. It was pointed out that in the judgment of Muthuswami Aiyar and Weir, JJ., in Second Appeal No. 1445 of 1889, a case from Calicut, their Lordships observed:

"The dwelling houses described in S 3, cl. (2) of the Act are grouped together with four buildings and the term 'improvement' itself is defined in the Act as 'a work which adds to the value of a holding'. In their ordinary sense the words appear to us to refer to dwelling houses appurtenant to a holding for agricultural purposes, and not to dwelling houses let within the limits of a town for purposes of residence only"

Again they say:

"The dwelling house for which compensation is claimed in this suit forms admittedly no part of an agricultural holding. The house, it is stated, is situated in a favourite suburb of the town of Calicut We are therefore of opinion that the Act does not apply, and section 7 of the Act does not render inoperative the restrictive covenant set out in Ex. A"

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Their Lordships accordingly held that Malabar Act (I of 1887) did not apply to such a case, and they disallowed compensation in respect of the said building. The present Act I of 1900 has not by any express provision made the point in any way clearer, but the object of the present Act would seem to be to secure to the tenants better (higher rate of) compensation for improvements in respect of which they would be entitled to compensation under the prior Act or by custom. At p. 345 of Malabar Law and Aliyasanthana Law of the late Mr. Justice Sundara Aiyar, edited by Mr. Sitarama Rao, the following passage occurs:—

"It appears, however, that the customary rule as to payment of compensation applied only to agricultural tenancies Vide *Logan's Manual*, Vol II, Appendix III (cxc)."

Though the question was discussed before me, no new and further materials have been placed before me to induce me to say that the decision in *Chathukutty* v. *Kunhappu*[1] requires reconsideration. On the other hand, though it was observed at page 814 of *Chathukutty* v. *Kunhappu*[1] that "curiously enough the question appears to be *res integra*," it now appears that a Bench of this Court in effect decided a similar point in 1890 in Second Appeal No. 1445 of 1889 from South Malabar. It also appears from the speech of the Hon'ble S. Subramania Aiyar in his final observations on this Bill that the question was raised when the Bill was being considered. He said:

"The Palghat Sarvajana Sabha entertains a doubt as to whether the definition of the word 'tenant' would not include lessees of warehouses and mercantile shops It may be pointed out that the scope of the Bill does not admit of such an interpretation, and that the Transfer of Property Act provides for leases other than leases for agricultural purposes."—*Fort St George Gazette*, Supplement, dated 2nd November, 1886.

I therefore think that absolutely no grounds have been made out why I should not follow the decision of this Court reported in *Chathukutty* v. *Kunhappu*.[1] As I said, the finding in this case is that the suit land is a roadside poramboke and as it was not thought necessary to keep it as such by the District Board at that time, it was suggested that the same may be handed over to the defendant on the particular terms and conditions mentioned in Ex. A for temporary occupation. Further, the erection of substantial buildings would, I think, in the present case, be inconsistent with the purpose for which the land was let: see definition of "improvement" in section 3 (3) of the Act. Nor could there be any custom applicable to lease of porambokes like the one before me.

1. (1927) I.L.R. 50 M 813. 53 M.L.J. 224.

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In this view it is not necessary for me to express an opinion on the question whether the Crown Grants Act would apply to such a case. *Prima facie* there are serious obstacles in the way of accepting the contention which found favour with the first Court on this point. Though it is true that the Government may have some rights in the underground soil of public roads, which according to the Act vest in the Local Boards for certain purposes, it does not, in my opinion, follow that the Local Board or the President is thereby an agent of the Government when it or he deals with such properties. On the other hand, a reading of sections 160 and 199 of the Madras Local Boards Act leads to the conclusion that such roads as roads for communication purposes vest in the Local Boards, which are entitled to deal with the same in the way authorised by law under section 160 (3). The President of the Local Board may, with the permission of the Board, grant leases of roadside poramboke according to the rules framed by the Government under section 199 (*d*). Local Boards may acquire property and lease the same subject to rules made by the Government. Though the Local Boards are bound by rules so framed by Government, they are so bound not because the Government happen to be the owner of the sub-soil but because the rules when framed become part and parcel of the Local Boards Act. I therefore think, as at present advised, that this case cannot be brought under the Crown Grants Act. But as I said, having come to the conclusion that the Malabar Compensation for Tenants' Improvements Act does not apply, it does not matter for the purpose of this case whether the Crown Grants Act applies or not.

I think the District Judge was right, and the Second Appeal is dismissed with costs. I allow the appellant three months' time for removal of the buildings.

N.S. — *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

Kolluri Subbarao .. *Appellant** (*Plff.*)

v

Kolluri Venkataratnam and others .. *Respondents* (*Defendants* 1 *to* 8, 10 *and* 12).

Subbarao v. Venkataratnam.

Civil Procedure Code (*V of* 1908), *O* 33, *Rr* 2 *and* 3—*Plaint filed with stamp duty—Filing of written statement raising an objection as to valua-*

*Appeal No. 423 of 1924 1st August, 1929

Subbarao v. Venkataratnam.

tion of suit and payment of Court-fee—Framing of issues one of which related to the valuation of the suit and Court-fee payable—Trial of this issue as a preliminary issue—Decision by Court that additional Court-fee was payable—Application by plaintiff to continue the suit in forma pauperis *on the ground of inability to pay the additional Court-fee demanded—Maintainability—Proper procedure to be followed by the Court.*

Where a plaint was filed with a stamp duty, the written statement was put in raising an objection to the valuation of the suit and the payment of the Court-fee, issues were settled one of which related to the valuation of the suit and the payment of the Court-fee, and the Court tried this issue as a preliminary issue and held that the Court-fee paid was insufficient and additional Court-fee was payable, but the plaintiff, being unable to pay the additional Court-fee demanded, applied to continue the suit in *forma pauperis,*

Held, that such an application was maintainable and not liable to be dismissed on the ground that it was not in the form prescribed by R. 2 of O. 33 and presented in person as required by R 3, and that the proper procedure was to see if the plaint discloses a cause of action and issue notice to the Government to see if the plaintiff was really a pauper unable to pay the additional stamp duty and, if the same was found, to allow the plaintiff to continue the suit in *forma pauperis*

Appeal in *forma pauperis* against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 8 of 1923.

C. Rama Rao for appellant.

P. Somasundaram for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—In this case the plaintiff is the appellant. He filed the suit for partition and delivery to him of his share in the properties alleging that he is a member of an undivided family with defendants 1 to 6, that the immoveable properties in the plaint schedule are joint family properties and praying that the decree in Suit No. 24 of 1922 should be set aside as not binding on him. He paid a stamp duty of Rs. 250 valuing the suit as one by a coparcener to be in possession with the other coparceners. The suit was filed on the 17th April, 1923, written statements were filed and preliminary objection was taken as to the valuation of the suit and the Court-fee paid. Issue 12 is: "Are the valuation of the suit and the Court-fee paid not correct?" The Subordinate Judge in dealing with it disposed of the preliminary point and held that the valuation was not correct. He held that the plaintiff should not value the suit under S. 7, para. 4 (*b*) and was not entitled to put his own valuation on the property. He held that the amount payable was prescribed by S. 7, para. 5 of the Court Fees Act. When he held this the plaintiff put in an application to be permitted to continue the suit in *forma pauperis* on the ground that he was unable to pay the heavy stamp duty of

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Rs. 1,523 and odd which would be payable by him in addition to the fee already paid. He put in the usual application through his pleader to allow him to continue in *forma pauperis*. The Subordinate Judge dismissed the application on the short ground that it was not in the form prescribed by the Code and that it was not presented by the plaintiff in person and hence the appeal. The first question is, whether the Subordinate Judge was right in dismissing the application. It is now clear on the authorities that in a case like the present it is open to the plaintiff to apply to continue the suit in *forma pauperis*. We need only refer to *Thompson* v. *The Calcutta Tramway Company*[1] and *Revji Patil* v. *Sakharam*.[2] Although there is no direct decision in the Madras Court on the point the learned Judges who decided *Solayappa Chetty* v. *Lakshmanan Chetty*[3] expressed no dissent from the view that such an application would lie. If such an application lies, then the question is, whether the Subordinate Judge was right in holding that it should be in the form prescribed in Rule 2 of Order 33 and presented in person as required by Rule 3. It is difficult to see how these rules can apply to a case like the present. Rule 2 contemplates that the application itself should be in the form of a plaint. It should contain all the particulars required as regards plaints in suits; there should be a schedule of any moveable and immoveable property belonging to the applicant and its estimated value and the application should be signed and verified in the manner prescribed for signing and verification of pleadings. Rule 3 says that the application should be presented by the applicant in person unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application and may be examined in the same manner as the party. Rule 4 is that when the application is in proper form and duly presented to the Court it may, if it thinks fit, examine the applicant or the agent when the applicant is allowed to appear by agent regarding the merits of the claim and the property of the applicant. Rule 5 says that the application shall be rejected if it is not *inter alia* framed and presented in the manner prescribed by Rules 2 and 3. Then we come to Rule 8 which says that where the application is granted it shall be numbered and registered and shall be deemed the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner except that

1. (1893) I.L R. 20 C 319. 2. (1884) I.L.R. 8 B. 615.
3. (1919) 38 M.L.J. 146

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the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Now the question is where as in the present case the plaint has already been filed with a stamp duty which is found to be inadequate, where a written statement has been put in and issues settled and the Court at a trial of an issue as to the Court-fee wants additional Court-fee which in amount is so large that the plaintiff could not pay it, is the application for permission to continue the suit in *forma pauperis* to be dismissed because it is not presented as required by Rule 8 which *ex hypothesi* requires that the application should be in the form of a plaint and when admitted is to be numbered and registered as a plaint. It is obviously impossible in a case like the present. There is already a plaint registered and numbered containing all the allegations and an application to continue it in *forma pauperis* could not be treated as a plaint or registered as a plaint. It is therefore obvious that it is not possible to comply with this provision. In such cases the question is what is to be done. It has been held, as we said before, that it is competent to the Court to allow in its inherent power the party to apply to continue the suit in *forma pauperis*. If that power exists, there should certainly be some power in the Court by which that procedure can be followed up. There is no use of saying that the Court can do it and at the same time requiring the party to do something which is impossible, under Rules 2 and 8. In such cases the proper thing would be to see if the plaint discloses a cause of action and issue notice to the opposite side and to the Government to see if the plaintiff is really a pauper unable to pay the additional stamp duty. If that is enquired into and found, he should be allowed to continue the suit in *forma pauperis*. In the present case there is no doubt that on the plaint there is a sufficient cause of action. It is not barred on the face of it and there is no reason for any inquiry except the inquiry as to whether the plaintiff is or is not able to pay the large additional fee demanded. We are therefore of opinion that the Subordinate Judge is wrong and that the matter should be tried on the lines indicated above. If the plaintiff is found a pauper, of course the other issues will go on as if the proper stamp duty had been paid.

One other point has been raised by the appellant's advocate that the order of the Subordinate Judge is wrong in requiring him to pay additional duty. In view of the decision on the

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other question it is unnecessary to decide this point. We think that when occasion should arise for the plaintiff or the defendants to pay stamp duty an inquiry as to the proper Court-fee payable should be held after notice to the Government. We allow the appeal and send the case back to be disposed of in the light of the observations in our judgment. The costs of the appeal will abide and follow the result.

There is no question of any Court-fee paid to the Government on the appeal memo. because even if it had been paid, the appellant would be entitled to refund.

N.S. *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE CORNISH.

Kesava Pillai and another .. *Prisoners* (Accused Nos. 2 and 4).*

Kesava Pillai, *In re.*

Criminal Procedure Code (V of 1898), S. 540—Criminal Trial—Essential document overlooked by the prosecution—Duty of Judge to have it admitted in evidence by recalling witness—Evidence Act, S. 24—Retracted confession—When can be acted upon without material corroboration.

Where an essential document had been overlooked by the prosecution in a criminal case, it is the Judge's duty to have it admitted in evidence by recalling a witness at any stage of the trial under S 540 of the Criminal Procedure Code.

There is no absolute rule that a confession, having been retracted, cannot be acted upon without material corroboration If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, the confession can be acted upon as it stands and without any further corroboration.

Trial referred by the Court of Session of the South Arcot Division for confirmation of the sentences of death passed upon the said prisoners in Case No. 14 of the Calendar for 1929.

N. S. Mani, D. R. Venkatesa Aiyar and *S. Venkatachala Sastri* for prisoners.

The Public Prosecutor on behalf of the Crown.

The judgment of the Court was delivered by

Waller, J.

Waller, J.—The three appellants have been convicted of the murder of one Thillaikannu Pillai. The 1st appellant is the murdered man's son. The 2nd and 3rd appellants are respectively the 1st appellant's brother-in-law and father-in-law.

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*Referred Trial No. 82 of 1929. 21st August, 1929.
Cr Appeals Nos. 254 and 334 and Cr R.C. No. 422 of 1929.
(Taken up No. 22 of 1929)

Kesava Pillai, *In re.*

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Another brother-in-law was charged with them but acquitted. There was, we consider, no ground for differentiating between him and his brother. If the Sessions Judge accepted, as he did, the confessions of the 1st and 3rd appellants and the evidence of P.Ws. 10 and 11, he should have convicted the 3rd accused as well. The fact that his name did not appear in Ex. E was, comparatively speaking, of very little significance.

That there was ample motive for the murder is clear. In the first place, Thillaikannu was keeping a woman called Nagu and spending money on her, to which his son and no doubt his wife's family objected. In the next, Thillaikannu's relations with his son's wife (P.W. 2) had given rise to constant quarrels. He had been intimate with her before she was married and the intimacy continued after her marriage. About ten days before the murder, the 1st appellant had caught her going to his father's room at night and thrashed her, threatening to kill himself or her, unless his father was murdered. Lastly, the father had been talking of settling some of his property on his daughter (P.W. 1) on account of the quarrels between himself and his son. All this has been conclusively established.

On the night of 11th January last, Thillaikannu went out to his field with the 1st appellant, after which he disappeared. Eighteen days later his body was dug up, in consequence of information given by the 1st appellant to P.W. 1. She heard of her father's disappearance and came back to her native village to make enquiries. When she came, the 1st appellant began by telling her that their father had gone to Cuddalore. The next day he confessed to her that he and his father-in-law and brothers-in-law had murdered Thillaikannu and buried the body between two rocks in his field, after which he attempted to commit suicide, but was saved by P.W. 8. The Village Munsif was informed and the 1st appellant took him and pointed out the place where his father's body had been buried and it was dug up.

The main evidence in the case consists of confessions by 1st and 3rd appellants. There can be no doubt that the 1st appellant confessed to his sister that he and the other three had murdered his father, though she made a desperate attempt to save him by alleging that he did not, in his confession, implicate himself. In the end when confronted with Ex. F—a statement made by her to the Village Munsif—she had to admit that he confessed to her that he also had helped in the murder. Strong objection has been taken by the defence to the Sessions Judge's

procedure in having recalled her, after her deposition had been concluded, in order to put Ex. F to her. There is no force in the objection. S. 540, Criminal Procedure Code, gives a Judge the fullest discretion to recall a witness at any stage of a trial and makes it imperative for him to do so, if he considers further evidence essential to the just decision of the case. Here an essential document had been overlooked by the prosecution and it was the Judge's duty to have it admitted in evidence. To argue that he should not have carried out that duty, as the result was fatal to the accused, is to suggest that the words "just decision" mean a decision in favour of the defence.

We are satisfied that P.W. 1 has given a perfectly correct account of what her brother confessed to her. The circumstances all indicate that he must have taken part in the murder himself. He had the strongest of motives for doing so. He was certainly present. He knew where the body had been buried. He first of all lied to his sister about their father's whereabouts and, after confessing, tried to commit suicide. Before the Committing Magistrate, no doubt, he, while admitting his presence, attributed the murder to the other three accused. In the Sessions Court, he resiled even from that admission. The fact that he has retracted altogether makes little or no difference, as apart from his retracted confession there is ample circumstantial evidence from which his guilt can be inferred.

The 3rd appellant made a complete confession to the Committing Magistrate, implicating himself, the 1st appellant and his sons in the murder. This he withdrew in the Sessions Court, alleging that he had been tortured by the Police into making it. That was, of course, absurd. He had not been in the custody of the Police. He had never complained of torture before and, when he made his confession, he was standing in the presence of a Magistrate. What happened seems obvious. He must have been angered at the 1st appellant attempting to save his neck at the expense of his fellow-culprits and was unable to contain himself and blurted out the truth. We are told that the confession, having been retracted, cannot be acted upon without material corroboration. There is, of course, no such absolute rule. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, it is not apparent why that confession should not be acted on as it stands and without any further corroboration. Not that corroboration is lacking in this instance. It is not likely that the murder was the work of one hand. Thillaikannu's treatment

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of his daughter-in-law and her husband, his wasting of his substance on P.W. 5, his threat to settle his property on P.W. 1, must all have roused fierce resentment in the daughter-in-law's family. It is conclusively established that the appellant was away from his house on the night of the murder and, before the Committing Magistrate, his wife admitted that he had told her that he had taken part in the murder. In the Sessions Court, she asserted that this admission was due to torture by the Police, of which she had never complained before. We are of opinion that the Sessions Judge was entirely justified—in view of her obvious desire to save her husband and sons—in admitting her deposition before the Committing Magistrate as evidence at the trial under section 288, Criminal Procedure Code.

In the result, we must find that the 1st and 3rd appellants have been rightly convicted. It is urged that P.Ws. 1 and 8 should not be believed, as they would benefit by the conviction of the 1st appellant. The answer is that P.W. 8 saved him from committing suicide and that both he and P.W. 1 have made every effort to save him from conviction.

There remains the case against the 2nd appellant. It rests mainly on the confessions of the other two appellants, which are not evidence against him, but may be taken into consideration together with any other evidence there may be. The Sessions Judge finds that evidence in the story told by P.Ws. 10 and 11, which we regard with some degree of suspicion. Had it been forthcoming at the inquest, we might have accepted it, but, though the witnesses were then present, they gave no information. It is true that the appellant had as much motive to commit the murder as his father had. It is also probable that he was in his father's company that night. On the whole, however, we have come to the conclusion that he should not have been convicted. He is acquitted and will be released from custody.

The sentence passed on the 3rd appellant is confirmed. The 1st appellant has been called on to show cause why his sentence should not be enhanced. We do not entirely accept the reasons given by the Sessions Judge for not hanging him, but his father had treated him very badly and it is possible that his father-in-law may have been the leader in the crime. We propose, therefore, not to interfere, but to confirm his sentence.

N.S. *Appeal confirmed as regards appellants* 1 *and* 3 *and allowed as regards 2nd appellant.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE WALLACE AND MR. JUSTICE ANANTAKRISHNA AIYAR.

A. M. Narayana Sah .. *Appellant** (*Plff.*)

v.

A. Sankar Sah and others .. *Respondents* (*Defts.*).

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Hindu Law—Joint family—Partition—Branches—Partition between—Shares at—Partition prior allotting share to a member of one of branches—Share of remaining members of that branch at subsequent partition—Share allotted at prior partition if to be taken into account in determining—Manjanatha v *Narayana,* (1882) I.L.R. 5 M 362—*Correctness of decision in.*

A Hindu Mitakshara undivided family consisted of four brothers and their sons. A son of one of the four brothers sued for partition and delivery to him of his share in the joint family properties, and obtained a decree in respect of his share All the other members of the family, however, remained joint. Some years afterwards, and after the death of the four brothers, the brothers of the plaintiff in the prior suit, the remaining members of that branch, filed a suit for partition against the sons of the other three brothers; and the question arose whether in the partition in the subsequent suit the share that was decreed to the plaintiff in the prior suit should be taken into account, as laid down in *Manjanatha* v. *Narayana,* (1882) I.L.R. 5 M 362, or whether the subsequent partition should be made *rebus sic stantibus* as at the time of such subsequent partition.

Held by the Full Bench, affirming *Manjanatha* v *Narayana,* (1882) I.L.R. 5 M 362, that the share decreed to the plaintiff in the prior suit should be taken into account in the subsequent partition.

Per Anantakrishna Aiyar, J—It is not the actual number of shares that is to be taken into account in such cases, but only the share-fraction.

On appeal from the preliminary decree and judgment of the Honourable Mr. Justice Kumaraswami Sastri, dated the 12th day of January, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 170 of 1923.

K. S. Krishnaswami Aiyangar and *N. Rajagopalan* instructed by *P. V. Sudarsana Raju* for appellant.

V. V. Srinivasa Aiyangar for *T. L. Venkatrama Aiyar* and *V. Ramaswami Aiyar* for *K. Rajah Aiyar* for respondents.

The Court (Chief Justice and Pakenham Walsh, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH. *Pakenham Walsh, J.*—This is a suit by the plaintiff for partition of joint

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*O.S. Appeal No 38 of 1926 9th April, 1929.

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family properties and for delivery of his share. One Munusami Sah, Sankar Sah (1st defendant), Chinnasami Sah and Ponnusami Sah were four brothers. The 1st defendant is one of the above four who is alive. Munusami Sah had three sons and a daughter. One son Sudarsana Sah filed C.S. No. 63 of 1910, got a share and separated himself from the family; the second son Chender Sah is the 10th defendant and plaintiff is the third son. Various other members of the family are set out in the genealogical tree and it is unnecessary to particularise them further here. The plaintiff is the appellant.

There are only two questions in the appeal: one of fact and one of law. The one of fact is, whether the contract with the Madras Corporation was a separate business of the 1st defendant or a joint family business. The learned Judge has found on the question of fact that it is a joint-family business and I have no hesitation in agreeing with him. The family was one which traded by taking contracts, but the plaintiff alleges that this contract with the Madras Corporation was solely carried on by the 1st defendant. Paragraph 9 of the plaint states that the 1st and 8th defendants have been carrying on a family trade in gold lace, lametta and other goods and have also been carrying on the family contracts on behalf of the joint-family with the Government, for the supply of badges and for stitching uniforms to the Army, Police, etc. Under such circumstances, there is no reason to suppose that the contract with the Corporation would also not have been a joint-family business. The chief argument urged against this is that in the written statement filed by the present 1st defendant in the partition suit he puts himself down as a debtor to the family in a sum of Rs. 9,000 (Item No. 214). This admittedly represents the value of materials which had been handed over to the family by one Chockalinga Naicker who was indebted to the family and had undertaken the contract with the Corporation. At the time of this partition suit, the contract with the Madras Corporation had not been taken up by the plaintiff's family and the plaintiff in that suit was therefore not concerned with it. The 1st defendant has explained why under the circumstances he showed himself as a debtor for this amount to the family. In the *Thundukanakku* with a Chetti for sums borrowed on account of this contract, there is a credit for Rs. 1,359-3-9 in respect of lametta which obviously refers to joint-family business in that commodity. Moreover, the 10th defendant who supports the plaintiff's case that the contract business was not joint-family business admits that he was writing the accounts for it. He stated first

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that he only began to do so in 1915 but had to admit that he had written them ever since the contract was entered into in 1910 and he could only give the lame explanation that he wrote them as he was asked to. The other adult members of the family were in fact writing these accounts though plaintiff professes that he kept entirely aloof. The 8th defendant admits that the contract was a joint-family one and I have no hesitation in agreeing with the finding of the Court of First Instance in this matter.

The second question, which is one of law, is much more difficult and turns on the point whether the share taken by the plaintiff's branch of the family when his brother Sudarsana became divided is to be taken into account or not in making the present partition. The learned Judge following the decision in *Manjanatha* v. *Narayana*[1] has held that the share must be taken into account and he has accordingly granted the plaintiff only 1|12 instead of 1|8. We have been asked to make a reference to a Full Bench as to whether this decision is still good law. The grounds urged against its correctness may be summarised as follows:—

(1) That it proceeds on a wrong principle of law in holding that the share of any member or branch of an undivided Hindu family can be predicated before an actual partition is made and that a view opposite to *Manjanatha* v. *Narayana*[1] has been taken in *Pranjivandas Shivlal* v. *Ichharam.*[2]

(2) That the Smriti Chandrika which is invoked by the learned Judges in *Manjanatha* v. *Narayana*,[1] in support of their view has since been held to be not an authority and that failing this the Mayukha which holds in an opposite sense is good law in this Presidency unless it is opposed to the Mitakshara.

(3) That the argument relied on that those who have capacity to confer spiritual benefits on the common ancestor ought to take equal shares, is no longer sound in law.

(4) That even as regards equality, it cannot be secured by taking a previous division into account, that such a course may actually work inequality and that it is impracticable in execution. We are asked to hold that the correct law is that adopted in *Pranjivandas Shivlal* v. *Ichharam*[2] in which *Manjanatha* v. *Narayana*[1] was considered and dissented from.

Turning to the first argument, the principle that the share of any member cannot be predicated until the partition is actually effected was laid down by the Privy Council as long ago as *Appovier* v. *Ramasubba Aiyan.*[3] Lord Westbury says:

1. (1882) I.L.R. 5 M. 362 2. (1915) I.L.R. 39 B. 734.
3. (1866) 11 M I.A. 75 at 89.

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"According to the true notion of an undivided family in Hindu Law no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, the particular member, had a certain definite share."

Mayne on Hindu Law, page 346, paragraph 270, is also quoted. He says:

"It is common to say that in an undivided family each member transmits to his issue his own share in the joint property, and that such issue takes *per capita inter se*, but *per stirpes* as regards the issue of other members. But it must always be remembered that this is only a statement of what would be their rights on a partition. Until a partition all their rights consist merely in a common enjoyment of the common property, to which is further added the right of male issue to forbid alienations, made by their direct ancestors."

It is urged on the other side that though it may not be quite correct to talk about any branch or member having a vested interest in a joint family, nevertheless in this Presidency a member has in a certain sense a definite share at any moment which he can alienate and that his power to alienate extends to the share to which he would be entitled if division took place at the time of alienation and the alienee's right will not be diminished by subsequent births in the coparcenery. *Chinnu Pillai* v. *Kalimuthu Chetty.*[4] It is also urged that advances made to a coparcener for private purposes and not for the benefit of the family considered as a whole can be adjusted at partition. (*Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[5]). It is further contended for the respondent that one branch cannot take more than its share by effecting a separate partition amongst its members while the rest of the family remains united and it was endeavoured to deduce this equality of the sons from the text in Yajnavalkya 120 and Vignanesvara's commentary thereon. Mr. Srinivasa Aiyangar for the respondents has furnished a translation of the text and of the commentary. Speaking for myself, I do not see any reason to prefer it to that given in Setlur. The latter translates *Pitruthas* (पितृतस्) "according to father." It appears to me to be preferable to "through the fathers." It is also the translation in Mandlik. In the commentary it is no doubt true that the words *Pithrudwaraneva* (पितृद्वारेणेव) are very emphatic and I take it that they literally mean "verily through the door formed by the father." The words *Naswaroopapekshaya* (नास्वरूपापेक्षया) which Mr. Srinivasa Aiyangar translates "not by reason of their own personal being" are if I may say so respectfully better rendered by Colebrooke "not with respect to themselves" though it is difficult to

4. (1911) I.L.R. 35 M. 47 at 59: 21 M.L.J. 246 (F.B.)

5. (1857) 6 M.I.A. 540

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give an exact English equivalent of *Swaroopa* (स्वरूप). I may note that in a case before my learned brother Devadoss, J. and myself the very same text and the same commentary have been quoted to show quite the opposite thing, namely, that the sons really represent the grandfather's estate and that the only way the father comes in is as a mere measure or quotient. For the purposes of the present case, it appears to me to be immaterial which view we adopt, *i.e.*, whether we stress the importance of the father or reduce him to a mere mathematical quotient, because the text does not throw any light on whether the father's share is to be deemed to remain the same at the second partition as it was before the partition which is the point in question here. There is no doubt that the view of the Privy Council in *Sreemutty Soorjcemoney Dossee* v. *Denobundoo Mullick*[5] must have been well known to their Lordships at the time they decided *Manjanatha* v. *Narayana.*[1]

The second argument is about the Smriti Chandrika. It is urged firstly that some later decisions go to show that it is no longer of force in the Madras Presidency and secondly it is pointed out that even if it is an authority it has no application to the present case. As regards the first point we are referred to *Narasimha Charlu* v. *Venkata Singaramma,*[6] *Kristnayya* v. *Venkatramayya*[7] and *Kristnayya* v. *Guruvayya.*[8] Although *Narasimha Charlu* v. *Venkata Singaramma*[6] does not show that the Smriti Chandrika was referred to, it will be seen from *Kristnayya* v. *Venkatramayya*[7] that its authority was urged in defence of the view which the Court ultimately declined to accept. Curiously enough, in that case, the learned counsel who supported the view which was opposed to the Smriti Chandrika is reported as quoting *Manjanatha* v. *Narayana*[1] to show that the Smriti Chandrika ought not to be accepted where it differs from the Mitakshara; whereas in *Manjanatha* v. *Narayana*[1] it is actually invoked in aid of the Court's decision. Their Lordships decided the case *Kristnayya* v. *Venkatramayya*[7] following an unreported decision in A.S. No. 170 of 1901 by three Judges, Subramania Aiyar, Benson and Bhashyam Aiyangar. The judgment in *Kristnayya* v. *Venkatramayya*[7] does not mention the Smriti Chandrika at all and the learned Judges merely say "We do not think that this contention," (*i.e*, that the son of a reunited brother would

1 (1882) I L.R. 5 M 362.
5 (1857) 6 M.I.A. 540
6 (1909) I L R. 33 M. 165: 19 M.L.J. 719.
7 (1903) 19 M.L.J. 723 (F B). 8. (1921) 41 M.L.J. 503.

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not have the status of a reunited member with his uncle) can be supported by any text of the Hindu Law or by any reported case. In that case *Abhai Churn Jana* v. *Mangal Jana*[9] was relied on. But the most important case cited by the plaintiff to show that the Smriti Chandrika is not an authority in this Presidency is *Kristnayya* v. *Guruvayya*.[8] Phillips, J., at page 505 remarks:

> "In *Kristnayya* v *Venkatramayya*[7] a Full Bench of this Court held that this contention of proportionate shares could not be supported by any text of the Hindu Law and was opposed to the fundamental conception of the status of an undivided Hindu family or of a reunited Hindu family Whether this passage in Smriti Chandrika was quoted before the learned Judges in that case does not appear from the report; but it was quoted in a later case reported in *Narasimha Charlu* v *Venkata Singaramma*[6] in which a Bench of this Court declined to accept the authority of the Smriti Chandrika and followed a previous Full Bench ruling"

The learned Judge states that there is one case in which a single Judge of this Court (Sankaran Nair, J.) held the contrary view, but that the balance of authority was in favour of the view that on reunion the members are remitted to their former status. The Smriti Chandrika lays down the opposite of this. The other Judge in that case, Krishnan, J., expressed no opinion about the Smriti Chandrika. At the time when *Manjanatha* v. *Narayana*[1] was decided there was some uncertainty whether when one member becomes divided the question whether the others separated or remained joint was purely one of fact. It is now settled law that it is simply a question of fact and no legal fiction of separation and reunion has to be invoked. The last decision on this point is *Palani Ammal* v. *Muthuvenkatachala Moniagar*.[10] In the present case, the very terms of the first division state that the rest of the family remained joint. *Vide* Ex. A (plaint in C.S. No. 63 of 1910, paragraph 4). The importance of this point lies in this that if the rest of the family remained joint, as they undoubtedly did, the Smriti Chandrika which refers only to partition after the family has become reunited and says that under these circumstances division may be unequal if the reunited partners had brought unequal shares to the common stock has no application and can be merely used as an analogy. In fact Mr. Srinivasa Aiyangar frankly admitted that he did not rely on the Smriti Chandrika to support his position and argued that even in *Manjanatha* v. *Narayana*,[1] it was only used by way of analogy. The danger of such an analogy has been

1. (1882) I.L.R. 5 M 362.
6 (1909) I.L.R. 33 M 165: 19 M.L.J. 719 7. (1903) 19 M L J 723 (F B).
8 (1921) 41 M.L.J. 503 9. (1892) I.L.R. 19 C 634
10. (1924) L.R. 52 I.A. 83: I.L.R. 48 M 254: 48 M.L.J. 83 (P.C.).

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pointed out in *Debi Parshad* v. *Thakur Dial*,[11] a Full Bench case. Their Lordships say:

"It is dangerous then to draw an analogy from the special rules which apply to the devolution of the shares of re-united brethren Indeed, the circumstance that rules have been specially prescribed to regulate the devolution of the common property of re-united brethren affords ground for arguing that they were exceptions to the ordinary rules regulating the partition of the common property of an undivided family"

Therefore, as regards the second argument it would appear (1) that the authority of the Smriti Chandrika in this Presidency has been doubted and departed from, (2) that even if it is accepted, it has no application to the case where the family remains joint after the partition and in the view of Allahabad it even tells the other way. The importance of this lies in the fact that one of the reasons why the Bombay High Court in *Pranjivandas Shivlal* v. *Ichharam*[2] felt itself entitled to dissent from the Madras decision was that the Madras High Court relied on the authority of the Smriti Chandrika which has no direct authority in Gujerat wherefrom the Bombay case came, and that the Mayukha was opposed to it. If the Smriti Chandrika has no authority in Madras or if the passage relied on does not apply to the case before us, and if it cannot be shown that the principle laid down in the Mayukha is opposed to the Mitakshara, then the argument that we should follow the principle of Mayukha receives great weight.

The third ground of argument is that one of the reasons of the decision in *Manjanatha* v. *Narayana*,[1] namely, that equality of funeral oblations implies equality in partition is now obsolete, as religious efficacy as a test for a heritage has been exploded by a series of cases of which *Ramchandra Martand Waikar* v. *Vinayek Venkatesh Kothekar*[12] is the latest and that religious efficacy is now confined to cases of rival claims to succession between two bandhus of equal status, where it is said that the greater religious efficacy of one may be accounted as a ground of preference over the other. On the other side, it was pointed out that the son of the great-grandson is not one of the coparcenary, because he canont offer the funeral cake although from the point of consanguinity he is the direct descendant of the propositus.

Mayne, 9th edition, page 347, section 271.

Coming now to the fourth argument, that the alleged inequity of not taking into account the previous partition is not

1 (1882) I L.R 5 M. 362. 2. (1915) I.L.R. 39 B. 734.
11 (1875) I.L.R. 1 A. 105 at 116 (F B)
12 (1914) L.R. 41 I.A. 290 I.L.R. 42 C 384: 27 M.L.J. 383 (P C).

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a fact, it was remarked in the Bombay case that if the family had increased in wealth since the partition, it would be depriving that branch in which partition had taken place of their share in that increase to make the second partition with reference to the first and it was also observed that it would deprive them of the benefit which they would have got by survivorship from one or more of the stirpes in the interval between the partitions. Hayward, J., says:

"It seems to me, indeed, impracticable to frame any rule which would ensure absolute equality for all circumstances"

On the other side, it is argued that according to the law in Bombay sons and grandsons cannot claim partition against their fathers and uncles while the latter are alive and that this makes an important distinction when considering the argument of the Bombay High Court that the other members of the family can divide if they wish to and if they choose to remain united they take the risk of doing so. In other words, as was tersely stated by Muthuswami Aiyar, J., in *Manjanatha* v. *Narayana*[1]:

"It is anomalous to hold that in a case where two brothers, each of whom may have several sons and grandsons, desire to separate, all the members should be forced to separate, the sons and grandsons, from their father and grandfather."

These are the arguments that have been adduced for and against the supposed equity of the doctrine laid down in *Manjanatha* v. *Narayana*.[1]

The fourth argument which deals with the practicability of having regard to a previous partition is of considerable importance, though, of course, if the law clearly enjoins that such a partition must be taken into account, then in spite of all difficulties, the law must be carried out; but the difficulties are very considerable. In *Manjanatha* v. *Narayana*[1] Muthuswami Aiyar, J., distinctly states that he does not overlook the matter of survivorship, and is not to be understood as saying that the right of survivorship on the birth of new coparceners between the first and second partitions will in no case increase or decrease the shares to be allotted at the second partition. It is obvious that if the principle is to be applied even while the propositus is alive and capable of begetting more sons, it might happen that the share taken by one member or members of a branch at the first division would be greater than the share which that branch would be entitled to at the time of the second division; consequently its members at the second division would get nothing at all or might even be held to be indebted to the

1. (1882) I.L.R. 5 M 362.

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other branches. When the propositus be dead, it is clear that the share of each branch may be increased by survivorship. It is therefore absolutely impossible to start the calculation by predicating a fixed share to each stirpes or by stating that the share which the stirpes held at the time of the first partition is the same as it held at the second. We must therefore certainly begin at the other end by calculating the shares as if the family were being partitioned for the first time and then deduct from the branch the share which it has already drawn. This again leads to considerable difficulties. Suppose one member to have been very anxious to leave the coparcenary and to have had a partition effected taking only a small amount of what really was due to him. When we are calculating the amount to be taken by this branch at the second division, are we to take it that this member received his full share on the previous occasion or merely debit the branch with what he actually took? Again, if the share is not taken in money but in property, have we got to go back and calculate the value of the property at the time of the previous division or are we to take it at its present value? Even in the present case, we have had two contentions (assuming that the view of the learned Judge is correct) as to the method of division, one is that since at the former partition A. M. Sudarsana Sah who went away took 1|12, the present plaintiff's branch (plaintiff and his brother) should take one-quarter *minus* 1|12, *i.e.*, 1|6th or each 1|12th. This is the method which has been adopted by the learned Judge of this Court and it is the method which was contended for but not allowed in the Bombay case. On the other hand, it is argued for the plaintiff that we should consider that there are 11 shares left in the family after the departure of A. M. Sudarsana Sah of which plaintiff would get one share or 1|11th of the whole estate. It was argued that the result in *Manjanatha* v. *Narayana*[1] was reached by this method, but Mr. Srinivasa Aiyangar for the respondents has shown that in the Madras case the result obtained can be reached by the other method. The principle of *stare decisis* has, of course, been strongly urged upon us. But there do not appear to have been any reported cases since *Manjanatha* v. *Narayana*[1] where this precise point arose. In A S. No. 223 of 1917, the question was whether, when a father only had separated both from his own father and from his son and the son remained joint with his grandfather, the son was liable for a mortgage binding on the latter. In that case, *Manjanatha* v. *Narayana*[1] was only referred to on the

1 (1882) I.L.R. 5 M. 362.

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question as to whether the withdrawal of some members of a branch affected the application of the principle of representation as between the different branches. Sir John Wallis, C.J., notices the decision in *Pranjivandas Shivlal* v. *Ichharam*[2] in the following words:

> "The decision in *Manjanatha* v. *Narayana*[1] has been dissented from in Bombay in *Pranjivandas Shivlal* v. *Ichharam*[2] on grounds to some extent peculiar to that Presidency. As at present advised, I see no sufficient reason for differing from it in this Presidency, but, *whatever the basis on which Manickam's share should be calculated on a fresh partition,* I think the parties to Ex I clearly manifested the intention that Manickam should remain united with his grandfather's branch."

Spencer, J., says:

> "The importance of the decision in *Manjanatha* v *Narayana*[1] is, so far as this Presidency is concerned, not seriously affected by the doubt thrown upon the correctness of the rule laid down therein as to the shares to be taken in a partition between reunited coparceners, in the case of *Pranjivandas Shivlal* v *Ichharam*,[2] seeing that the Madras decision purported to follow the doctrine of the Smriti Chandrika and the Bombay decision adopted the rule prescribed in the Vyavahara Mayukha which was of greater local authority."

It is clear therefore that *Manjanatha* v. *Narayana*[1] was only mentioned in this connection with reference to the question as to whether a member, whose share had been notionally calculated for purposes of effecting a previous division became separated by this previous notional partition or remained united, and the basis on which the shares should be calculated in the second division did not arise at all for determination.

Pranjivandas Shivlal v. *Ichharam*[2] appears to have been a case of first impression in that Presidency and I cannot help thinking that the principle of *Manjanatha* v. *Narayana*[1] cannot have been widely known or availed of in this Presidency, because considering the numerous difficulties in working out a second partition which takes account of the share taken away in a former partition, it would seem almost inevitable that some cases would have come up afterwards for decision on these difficult questions. But there appears to be no subsequent case on the point. This may perhaps indicate that in practice the principle laid down in *Manjanatha* v. *Narayana*.[1] has not been followed and if so there may not be so much force in the argument of "*stare decisis*" in this case even though it is one of succession, as to justify a refusal to make a reference on the point. I would therefore propose that my Lord the Chief Justice be asked to refer the following question to a Full Bench:

1 (1882) I L.R. 5 M. 362.
2. (1915) I.L.R. 39 B 734.

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"When there has been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition, as laid down in *Manjanatha* v *Narayana*,[1] or, should the subsequent partition be made *rebus sic stantibus* as at the time of such subsequent partition?"

The Chief Justice.—I agree.

K. S. Krishnaswami Aiyangar and *N. Rajagopalan* instructed by *P. V. Sudarsana Raju* for appellant.

V. V. Srinivasa Aiyangar for *T. L. Venkatrama Aiyar*, and *V. Ramaswami Aiyar* for *K. Rajah Aiyar* for respondents.

The Court expressed the following

Coutts Trotter, C. J.

OPINION. *The Chief Justice.*—The facts which give rise to the question we have to decide are set out at the beginning of the judgment of my brother Anantakrishna Aiyar. The point is a very short one and, were the whole matter to be regarded as being at large, I should attach very great weight to the arguments addressed to us with much learning by Mr. K. S. Krishnaswami Aiyangar. There can be no doubt of the logic of the statement that, until an actual partition arises, no member of a coparcenary can be said to have a share nor can any branch of the whole family; but in my opinion it is far too late to apply all those logical rules in their strictness to Hindu Law as we find it to-day. Modifications have been found necessary as, for instance, in the case of the alienee from a member of the coparcenary who is allowed to stand in his shoes and enforce a partition. See *Suraj Bunsi Koer's case*,[13] where their Lordships frankly concede that the sanctioning of such transactions can be justified not by strict Hindu Law but by necessary implications of equity. Similarly with regard to a partial partition as in the present case, and I think it may be taken as settled law now that the separation of one branch of the family does not involve a notional partition of the whole property including all the members with the corresponding legal fiction that the remaining branches or members are to be deemed to have re-united. The appellant most strongly relied on the pronouncement of Lord Westbury in *Appovier* v. *Ramasubba Aiyan*,[3] in which he says:

"No individual member (of an undivided family) while he is remaining undivided can predicate of the joint and undivided property that he, that particular member, has a certain definite share"

That is indisputable. But it is quite possible to predicate what would be the share of the branch to which the dividing

1 (1882) I L.R. 5 M 362
3. (1866) 11 M.I A. 75 at 89
13 (1879) L.R. 6 I.A. 88: I.L.R. 5 C 148 (P C).

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brothers under the partial partition belong or of the individuals who pass out of the family on a partition on that date. It was held by this Court in *Manjanatha* v. *Narayana*[1] that, when the eventual complete partition took place, the branch to which those members belonged and who had under the partial partition taken their shares and passed out of the family was to be debited in the ultimate reckoning and that the remaining members of the branch were not to be allowed to claim what would stand to be their share at that ultimate reckoning on the footing that the family property is to be regarded as divisible on the final partition among the co-sharers then existing without any reference to the partial partition which denuded the family property *pro tanto* to the extent taken away by the seceding members on the partial partition, the decision being based not on strict principles of Hindu Law but on necessary considerations of equity. With that view I am inclined myself to agree, having regard to the fact that the rules laid down under the old authorities were laid down at a time when partial partitions such as the present were not recognized in Hindu Law at all. They are now not only constantly carried out unchallenged by anybody but recognised by Courts. But I would rely rather on the principle of *stare decisis*. The decision reported in *Manjanatha* v. *Narayana*[1] is nearly 50 years old. It has certainly never been questioned although, oddly enough, until the present case it has not, so far as I can ascertain, been explicitly referred to with approval or said to be followed. The inference, I think, must be that in this Presidency this principle has been followed and innumerable transactions must have taken place over that long period and I think to unsettle it now would be to cast a cloud over many titles which have stood unchallenged for long periods. It is quite true that a Division Bench in Bombay came to a different conclusion in *Pranjivandas* v. *Ichharam*[2] and declined to follow *Manjanatha* v. *Narayana*.[1] They put it on the ground that the decision of the Madras High Court was warranted by the authority of the Smriti Chandrika which is not followed in Western India. I do not myself wish to rest this case on the authority of the Smriti Chandrika but, so far as it goes, it does support the respondent's position. I think it is rightly put by the learned Judges in *Manjanatha* v. *Narayana*[1] on the wider principle of equity which must compel the branch concerned to bring into account that portion of the family property which on the partial partition had gone to their

1. (1882) I.L.R. 5 M. 362.
2. (1915) I.L.R. 39 B 734.

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share. That equity thus affirmed I refuse to disturb on abstract considerations based on the old Hindu Law. I think this is a case to which the maxim "*Stare decisis*" obviously applies and, however undesirable it is that there should be different rulings in two Presidencies on the same subject, it is after all to be remembered that the various Courts and Presidencies of this country do stand in water-tight compartments in many matters of Hindu Law and have worked out their own rules independently. The inhabitants of each Presidency in the absence of an authoritative ruling to the contrary from the Judicial Committee only act on the faith of undisturbed decisions of longstanding in their own Court. The matter is considered in detail in the judgment of Anantakrishna Aiyar, J. I only add these few words because, as the editor of the current edition of Mayne, I am in part responsible for the propositions laid down in paragraph 270 of that work on which the appellant so strongly relies. I will take it that that paragraph lays down the strict rule of Hindu Law. As I have already pointed out, I think that there are countervailing and overriding equities which tell the other way. I agree that the answer to the question propounded should be in the affirmative.

Wallace, J.

Wallace, J.—The question referred to the Full Bench is:

"When there has been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition, as laid down in *Manjanatha* v *Narayana*,[1] or, should the subsequent partition be made *rebus sic stantibus* as at the time of such subsequent partition?"

This involves at the outset a consideration of what was laid down in *Manjanatha* v. *Narayana*[1] and the reasons for the decision. The genealogy of the family in that case is given in the leading judgment of Muthuswami Aiyar, J. At a partition of 1867 of Venkatesa's branch Ramakrishna and his three sons were alive, and of Narayana's branch only his four grandsons were alive. Three of these and two of Ramakrishna's sons then separated, the former taking 4|12 share and the latter 3|12, leaving five shares to the joint family consisting of Ramakrishna, his third son and the remaining grandson of Narayana. In 1872 Ramakrishna died. In 1879 his third son sued the remaining coparcener and claimed three-fifth share. The Subordinate Judge held that he and his coparcener shared alike and awarded him 2½ out of 5 shares. The High Court held that he was entitled to the three shares claimed by him on the foot-

1. (1882) I.L.R. 5 M. 362.

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ing that Narayana's branch had already had 4 out of the 6 shares originally due to that branch, while Venkatesa's branch had only had 3 of the 6 shares due to that branch. Thus there were only 2 shares left for the defendant in that suit, the grandson to Narayana, and 3 shares left for the plaintiff, the grandson of Venkatesa.

The question to be decided by the High Court in that case reduced to the simplest terms was this: when there are two branches of a joint family and one member of one branch separates leaving the rest still joint, is the share already taken by him to be deducted from the share due to his branch at a subsequent partition, or is it to be entirely ignored and the subsequent partition effected as if it was in itself an entirely new and complete partition? The learned Judges proceeded on the footing that the root principle of Hindu Law to be applied to the case was the desire to "ensure equality of partition in cases of vested interests held in coparcenary"—thus premising that each branch, *qua* branch, has before partition a vested interest in its theoretical fractional share, the share which would be due to it on a mental computation of the share which would come to it at an actual partition if then made; that is, that each branch theoretically has a fixed fractional share which is the whole share available to its members—a share which would fluctuate only by increase or decrease in the branches and not by increase or decrease among the members of the branches. The right of survivorship would thus operate in water-tight compartments within each branch so long as that branch is not extinct. Except when the share of a branch has been increased or diminished by the extinction or addition of other branches, the fractional share allotable to the branch is fixed and is not enlarged by virtue of the separation of any members of it. Sons come in through their father and represent him, and, so long as there are coparceners in each branch, the operation of the right of survivorship is precluded by the right of representation.

The Bench in *Manjanatha* v. *Narayana*[1] came to its decision on a consideration of three points:

(1) The equality of sharing under the Hindu Law is an equality of the vested interest of each branch as representing each son of the same father who had each a capacity to confer an equal amount of spiritual benefit on him.

(2) Any other principle would, when there has been a partial severance of the joint family by one or more members

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taking his or their shares and going off, result in an inequitable division unfair to branches which had remained whole in the joint family.

(3) The assistance of the Smriti Chandrika was called in in order to draw an analogy between this principle of partition and what the Smriti Chandrika lays down as the principle of second partition among re-united coparceners, namely, that the shares will be proportionate to what each brought into the common stock at re-union, a theory evidently based on the idea that the separation by partition by one member involves notionally a complete partition of the whole family and a re-union of the rest.

All these propositions are attacked by the appellant as being opposed to the Hindu Law. The first, in so far as the equality of sharing is based on the capacity of the sharers to confer spiritual benefit on the common ancestor, has admittedly now fallen out of favour so far as this Presidency is concerned as being not in accordance with the Mitakshara Law. The third proposition must, in view of the later development of the interpretation of Hindu Law, be regarded as no longer sound. It appears to be now well established that a re-union after partition restores the joint-family status so that that status does not in any essential differ from the status of the family before partition. See *Narasimha Charlu* v. *Venkata Singaramma*,[6] *Krishnayya* v. *Venkatramayya*,[7] *Krishnayya* v. *Gururayya*[8] and *Babu alias Govinddoss Krishnadoss* v. *Gokuldas Govardhandoss*.[14] So that the question before us resolves itself into a consideration of the legality of predicating "vested interest" of a branch in its notional fractional share and of the alleged inequity to the joint family, which is the point noted above as point No. 2. The appellant here maintains that such considerations of equity are irrelevant and that we must be guided entirely by the basic principle of Hindu Law, and quotes the well-known proposition of Lord Westbury in *Appovier* v. *Ramasubba Aiyan*,[3] which is too familiar to require quotation. He contends that the predication by the decision in *Manjanatha* v. *Narayana*[1] of vested interests in branches is contrary to this principle, and that no member, and therefore no set of members and no branch,

1 (1882) I.L.R. 5 M. 362
3. (1866) 11 M I.A. 75 at 89.
6 (1909) I.L.R. 33 M 165: 19 M.L.J. 719.
7 (1903) 19 M.L.J. 723 (F.B). 8 (1921) 41 M.L.J 503.
14 (1928) 55 M.L.J. 132

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can, while the family remains joint, predicate that it has a definite share. On the other side it is argued that, while this may be a correct statement of the original theory of the joint-family status as applicable to a case of complete partition, Hindu Law does not specifically deal with partial partition and therefore does not provide for any method of accounting and debiting which may be equitable when a partial partition has already occurred, and that the law itself as now laid down is continually predicating that at any given moment a coparcener can claim that he has a definite share and has it in his own possession, so much so that he can alienate it to others for value or a Court of law will hold it under attachment for a decree debt due by him: see *Lakshman Dada Naik* v. *Ramchandra Dada Naik*,[15] *Deendyal Lal* v. *Jugdeep Narain Singh*[16] and *Hardi Narain Sahu* v. *Ruder Perkash Misser*,[17] so that the above theory of the joint family status has been considerably modified in practice and is no longer good law; or perhaps to put it in another way, the rules of strict Hindu Law apply, and were only intended to apply to cases where there had been no previous partial partition and where no question arises of the rights of third parties. To this it is rejoined that such modifications as the law has allowed are founded entirely on considerations of equity towards strangers and do not affect the law on the status of the members of a joint family *inter se*, and that the statement of the Hindu Law enunciated by Lord Westbury still remains good law unaffected by the inroads of theoretical postulates carried out in the sacred name of equity, with which inroads the Court has nothing to do when the question for decision is entirely one between members of the joint family and in no way affects or involves the interests of outsiders.

Now I do not think it is possible to accept this last proposition in its entirety and hold that Hindu Law is still such a water-tight compartment unaffected by what goes on outside. To take the law as to the rights of an alienee to whom a coparcener has transferred his share for valuable consideration, it has no doubt been repeatedly laid down from the earliest times that what the alienee obtains is no more than the right to claim partition as against the other coparceners, which was the right possessed by his alienor. See *Deendyal Lal* v. *Jugdeep Narain Singh*,[16] *Suraj Bunsi Koer* v. *Sheo Persad Singh*,[13]

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13. (1879) L.R. 6 I.A. 88. I.L.R 5 C. 148 (P C.)
15. (1880) L R. 7 I.A. 181: I.L.R. 5 B 48 (P C)
16. (1877) L.R. 4 I.A. 247: I.L.R. 3 C 198 (P C)
17 (1883) L.R. 11 I.A. 26· I.L.R. 10 C 626 (P C).

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Hardi Narain Sahu v. *Ruder Perkash Misser*[17] and in this Court *Nanjaya* v. *Shanmuga*,[18] *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* [19] and *Kota Balabadra Patro* v. *Khetra Doss*.[20]

But if this is so, then in strict reasoning the alienee's right when he brings his suit would be no more than a right to stand in the shoes of his alienor if his alienor were then suing for partition instead of the alienee; that is, the alienee would be entitled to a decree for his alienor's share as at the time of *partition*, however, long that may be postponed after the date of the alienation. But the well-established law is that the alienee's right is to the fractional share to which his alienor was entitled on the date of the *alienation*, if he had then claimed and carried through a partition. Clearly then the alienee is held entitled not merely to claim partition but to claim to be given his alienor's interest in the property not at the time of partition but at the time of alienation. It follows that his alienor had at that time something to sell which was not merely a right to claim partition but some real and definite interest in the property which could be the subject of a legal transfer of property. This view is strengthened when it is remembered that it is also established law (see *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[21]) that the death of the alienor between the date of alienation and the date of the alienee's suit makes no difference to the right of the alienee to enforce partition and to obtain a decree for the share which was alienated to him If the alienee can claim nothing but the right to claim partition, a mere right *in personam*, then as that right could not survive beyond the death of the alienor he would take nothing, but on the contrary the law says that he takes the interest of the alienor at the time of the alienation. Now all this clearly re-acts on the joint family itself and its interests. Strict Hindu Law says that on the death of a coparcener his coparceners take his share by survivorship. It also says that a coparcener cannot alienate property at all because he is not individually possessed of any and that such an alienation is void against the joint family. Therefore as the law now stands, the equity done to the alienee is not only at the expense of his alienor but at the expense of the whole joint family.

This breach in the water-tight compartment is widened still further when we regard the present state of the law in a case of

17. (1883) L.R. 11 I.A. 26: I.L.R. 10 C 626 (P C).
18 (1913) I L.R. 38 M. 684: 26 M L.J. 576
19 (1914) I.L R. 39 M 265 27 M L.J. 409
20 (1916) 31 M.L J. 275
21. (1902) I L.R. 25 M 690 (F B)

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insolvency, that by the insolvency of a coparcener, of course for personal debts, his share vests in the Official Assignee and is thus lost to the joint family, a proposition evidently implied by the Privy Council in its judgment reported at *Sat Narain* v. *Behari Lal.*[22] That share can vest in the Official Assignee only if it first vested in the insolvent coparcener, and the vesting of a share is a very different thing from a mere claim to partition. Here again the death of the coparcener before partition would not restore to the joint family the share which had vested in the Official Assignee.

A still further breach is made when we consider the law, in this Presidency at least, that the share of a coparcener can be attached for a personal decree debt, and when once attached will be held by the Court to satisfy the debt even if the coparcener dies before the Court sale. It is difficult to realise how a mere claim to partition is attachable. Clearly, here also the theory is that some tangible interest vests in the coparcener which can be the subject of attachment and Court sale. The Privy Council has even gone so far as to speak of an attaching decree-holder having a *charge* on that interest (see *Suraj Bunsi Koer* v. *Sheo Persad Singh*[13]) or a *lien* on the share (see *Deendyal Lal* v. *Jugdeep Narain Singh*[10]), though attachment *per se* cannot create a charge on any property, much less on what is not property at all but a mere claim to partition. I have indicated in *Sankaralinga Mudaliar* v. *Official Receiver of Tinnevelly*[23] my view that the meaning of the use of the word "charge" or "lien" is that the Court employs its hold over the attached property for the benefit of the attaching decree-holder. However that may be, the attaching decree-holder benefits at the expense not only of his judgment-debtor coparcener but of the joint family as well.

I do not think the conclusion can be resisted that as the law stands it involves the proposition that a coparcener possesses and can transfer something much nearer to real property than a mere claim to partition. It is an interest in property, indefinite from the point of view that it may fluctuate in extent from time to time, but definite and ascertainable at any particular point of time, and actually made definite and ascertained by the act of the coparcener seizing and using it for his benefit and holding it as against the possession and use of it to which the joint family as

13. (1879) L R. 6 I A. 88· I L.R. 5 C. 148 at 166 (P.C)
18 (1877) L.R. 4 I.A. 247: I L.R. 3 C. 198 (P C.).
22. (1924) L.R. 52 I.A. 22: I.L.R. 6 Lah 1: 47 M.L.J. 857 (P C).
23. (1925) 49 M.L J. 616.

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a whole is entitled. The act of alienation makes definite the indefinite interest which the coparcener has and fixes it so that it is unaffected by any internal change within the joint family or by any of the rules of Hindu Law about devolution on death. So far, the Courts have not gone so far as to hold that an alienation *per se* is such an expression by the alienor of his unequivocal intention to separate as is sufficient to effect a severance of the alienor from the joint family, and at present the law is that the alienor, in spite of the alienation, remains a member of the joint family (*Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[21]), although the suit by the alienee for partition would presumably sever an alienor entirely from the joint family, and the alienee must always sue for partition of the alienor's whole share. See *Nanjayya* v. *Shanmuga.*[18]

As to the method of computation of the shares which the alienor can dispose of, it is now well settled in this Presidency at least by the Full Bench decision in *Chinnu Pillai* v. *Kalimuthu Chetti,*[4] relying on the Privy Council cases in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[13] and *Hardi Narain Sahu* v. *Ruder Perkash Misser,*[17] that what passes is the fractional share at the time of the alienation, and neither the definite share to be determined at the time of partition nor the money value of the share. The constant factor, if that phrase may be used, is the fractional share and not the value.

The net result of the law as it stands seems to be this, that each member of the joint family has at any definite period of time a present vested interest in the fractional share which would be his if a partition was then and there made, and which would, by a partition at his will and pleasure, be converted into a separate interest. It seems to follow that each branch has a similar vested interest in the share which would come to it, and could, I take it, equally well dispose of its share as the individual coparcener can dispose of his. The extent of the theoretical share of course will, as pointed out already, fluctuate with births and deaths in the joint family, but it is predicable with sufficient definiteness at any moment of time to be transferable. This sort of interest is just the sort of holding by a branch of an undivided fractional share at any moment of

4 (1911) I.L.R. 35 M 47 21 M.L.J. 246 (F B)
13 (1879) L R. 6 I A 88: I L R 5 C. 148 (P C.)
17 (1883) L R. 11 I A. 26: I L.R. 10 C 626 (P C).
18 (1913) I.L.R 38 M. 684: 26 M.L J. 576.
21 (1902) I.L.R 25 M 690 at 717 (F.B.).

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time *as if divided,* which is the essence of the principle in *Manjanatha* v. *Narayana.*[1] That case is therefore not wrong in predicating such a vested interest in the branch.

The question then is whether we can go further with it and say that the fractional share which represents that vested interest remains a constant factor so long as there is no increase or decrease in the branches. Undoubtedly, when a coparcener disposes of his share or part of it, he will, on a partition, be debited with what he has taken. *See* the judgment of Bhashyam Aiyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya.*[21] I can see nothing illegal or inequitable in the same principle being applied to a branch. We have seen that equity towards the alienee demands the sacrifice of the joint family as well as of the alienor. Equity equally demands that the alienor shall make good to the joint family, so far as he can, the sacrifice he has made it suffer. Hence the system of accounting and debiting against the coparcener has a sound foundation in equity, and the principle is not different for a branch, especially when, as the case *Manjanatha* v. *Narayana*[1] points out, division under Hindu Law involves first the reckoning of the number of branches and a division equally among them. The branch has had for itself whatever any member of it has taken from the joint family. I can see no difference in principle between predicating for the sake of equity this sort of definite interest in his share by a coparcener and debiting against him whatever he has allocated to himself and uses for himself, and predicating also for the sake of equity the same sort of interest by a branch in the share due to the branch and debiting it with whatever has been taken away from the other branches by any member of it, the share in each case being reckoned as the fractional share to which the coparcener or branch is entitled.

It is clearly not the case that this modification of the strict Hindu Law is entirely evoked in order to do equity to the outsider. It is as necessary for the purpose of doing equity to the joint family as a whole, and it is here I think that the case *Manjanatha* v. *Narayana*[1] rests upon firm foundation. When once equity has been allowed to invade the realm of strict Hindu Law, it is merely a question of how far it is to be allowed to go. The case *Manjanatha* v. *Narayana*[1] has laid down that it shall be allowed to interfere so far as to distribute the proportion of shares in the manner there laid down, and it is

1 (1882) I.L.R. 5 M 362
21. (1902) I.L.R. 25 M. 690 at 717 (F.B).

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not difficult to see that that method is based on considerations of equity towards the joint family itself. In such cases, a mental, although not a real, ledger is maintained against the appropriating coparcener or branch even while the joint family remains joint. If some principle of this kind is not adopted, clearly there would be a wild rush amongst coparceners to alienate their shares, and those who are hindmost, particularly minors, would suffer grievous loss.

It is not difficult, of course, to conceive of cases in which any kind of distribution would be inequitable towards some members. From one point of view, it might be considered inequitable that a separated member should lose his share in any increase in the general joint family property. In some cases the value of the fractional share alienated by the alienating coparcener may by no means be the same as the value of the share which the Court actually decrees to the alienee at the time of his suit. But the manifest inequity of rejecting the principle laid down in the case *Manjanatha* v. *Narayana*[1] was put before us in a hypothetical case by the learned counsel for the respondents, and I do not think that the learned counsel on the other side gave an adequate answer to that by saying that the joint family can always avoid such results by a suit for complete partition. The interests of minors in particular would be grossly prejudiced thereby, while compulsory separation amongst members who do not wish to divide is not necessarily an advantage to them, and the law, as it at present stands, does not allow several coparceners of a joint family to sue jointly in order to expel one delinquent member. It may be that, under considerations of equity, in future the law may decide that it should go further towards modifying the strict principles of Hindu Law than it has so far done, but at present it is not necessary for us to decide more than the question referred to us, namely, whether the ruling in *Manjanatha* v. *Narayana*[1] is still good law. Equality amongst the sons of fathers is of the essential spirit of Hindu Law, and the case *Manjanatha* v. *Narayana*[1] endeavours to secure that result by preventing any branch from eating part of its cake and keeping the whole. *Pranjivandas* v. *Ichharam*,[2] which is relied upon strongly by the other side, endeavours to secure that equality by ignoring the fact that any of the cake has already been eaten and by dividing the remainder equally. *Manjanatha* v. *Narayana*[1] decides that equity demands that at a second partition regard must be had

1. (1882) I L.R. 5 M. 362.
2. (1915) I.L.R. 39 B 734.

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to the state of the family before the first partition; *Pranjivandas* v. *Ichharam*[2] decides that equity does not demand such an inroad on Hindu Law. Of the two principles, I prefer that laid down in *Manjanatha* v. *Narayana*,[1] especially as the secondary principle of *stare decisis* is also in its favour. The judgment in *Manjanatha* v. *Narayana*[1] has stood for over forty years as the law in this Presidency, and we cannot doubt that numbers of partitions have been effected, or deliberately abstained from, on the faith of the decision there given that the rights of members of the family *inter se* were thereby legally determined. I cannot therefore see any justification for upsetting what has been the recognized law in this Presidency for so long a period. I would therefore answer the reference by saying that the law laid down in *Manjanatha* v. *Narayana*[1] is still good law.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—A Hindu Mitakshara undivided family consisted of four brothers and their sons. One of the sons of one of the four brothers filed a suit for partition and delivery to him of his share in the joint-family properties; the Court granted him a decree in respect of his share and all the other members of the family remained joint. Some years afterwards, and after the death of the four brothers, a suit for partition was brought by the remaining members of that branch, *i.e.*, by the other brothers of the person who was plaintiff in the previous suit, against the sons of the other three brothers; and the question raised is whether in this second partition the share that was decreed to the plaintiff in the prior suit should be taken into account.

The Hindu Law texts do not contemplate cases of partial partition—partial, either as regards the property to be divided or partial as regards the coparceners who seek to become divided. But such partial partitions have been taking place for a long time and the law relating to the same is practically Judge-made law.

In the Presidencies of Madras and Bombay, alienations by Hindu coparceners of their shares in the joint family property for consideration have been recognized by Courts and held valid; also creditors of such coparceners have been permitted by Courts to bring to sale the shares of their debtors who happen to be coparceners in joint Hindu families. Creditors have been allowed to attach the shares of such coparceners, and in spite of the

1. (1882) I.L.R. 5 M 362.
2. (1915) I.L.R. 39 B. 734.

F. B.

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third share fraction of the properties of a joint Hindu family and each of the branches B and C to a similar one-third fraction, and a coparcener of branch A entitled to a moiety of that one-third share belonging to branch A demanded partition and was allotted a moiety of one-third share of branch A, then in the subsequent partition which the remaining coparcener of branch A should demand as against branches B and C, it is just that he should be awarded only a moiety of one-third share, whereas each of the branches B and C should be allotted a one-third share. The increase or decrease in value of the property that remained after the previous partition should not be taken into account, and that which remains should be taken to represent the value of the share fraction to which the branches that remained joint were entitled. The principle of survivorship, result of new births and deaths, would all apply to the joint property that remained after the previous partition and allotment of share to the coparcener of a branch; instead of the ordinary share fraction to which branch A would ordinarily, and in the absence of special circumstances, be entitled at the time of the subsequent partition, it would be entitled only to that portion of that share fraction which remained to it after the partition was effected at the instance of the coparcener belonging to that branch. Equity and justice speak in favour of such a rule, and I do not think that we are precluded by any rules of Hindu Law from giving effect to the same.

There are observations in Mayne's Hindu Law that at the time of actual partition, a coparcener may be debited with amounts of separate expenditure incurred, not for the purpose of the family in the sense in which that expression is understood, but for exclusive private and personal purposes of the coparcener. In paragraph 293 of Mayne's Hindu Law the following judgment from the Supreme Court of Bengal is quoted:—

"We apprehend that at the present day when personal luxury has increased and the change of manners has somewhat modified the relations of the members of the joint Hindu family, it is by no means unusual that in the common khatta book, accounts of the separate expenditure of each member are opened and kept against him, and that on a partition, even in the absence of fraud or exclusion, those accounts enter into the general account of which the final partition and allotment are made"

In the Full Bench case in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[21] Justice Bhashyam Aiyangar observes as follows:—

"An undivided member of a family, though he may alienate either the whole or any part of his undivided share will continue to be an undivided

21. (1902) I.L.R. 25 M. 690 at 717 (F.B.).

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member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred No doubt such a member acts unfairly towards the rest of the family, and if they are dissatisfied with his so doing, their only remedy is to become divided from him. When a partition is effected subsequent to such alienation, either amicably or by suit, the property alienated will be included in such partition and debited to the share of the alienor . . . . the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer"

So, the principle of debiting to the share of a coparcener at the date of the partition something with which he was specially concerned is not a new one.

The question is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an equitable doctrine established by judicial decisions. Hindu Law text-writers knew nothing of partial partition. Therefore the theory and incidents of joint family and joint-family property according to the genius of the Mitakshara are not the sole questions that should govern us, but it is the nature and extent of the equitable principles relating to partial partition established by modern decisions that have to be really considered and applied to such cases.

I need not consider the arguments adduced in the judgment in *Manjanatha* v. *Narayana*[1] derived from the doctrine of reunion or from Smriti Chandrika; I think that the principle laid down in that case is supportable from considerations other than those derived from the doctrine relating to reunion or from the provisions of the Smriti Chandrika. The principle of that decision has been accepted in this Presidency without any question from 1882. People have obviously on the faith of that decision regulated their conduct. Ordinarily it is open to the other coparceners of a Hindu family to claim separation of their shares whenever any coparcener demands severance. It is clear that but for the enforcement of the principle laid down in *Manjanatha* v. *Narayana*[1] the members who elected to remain joint would be seriously prejudiced if the view put forward by the plaintiff in the present suit and the view that recommended itself to the learned Judges of the Bombay High Court be accepted (see the details worked out in the Appendix at the end). The learned Judge who tried the suit (Kumaraswami Sastri, J.) has mentioned in his judgment that the deci-

1. (1882) I.L.R. 5 M. 362.

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sion in *Manjanatha* v. *Narayana*[1] has never been questioned in this Presidency, but that it has been acted on for several years, and that the principle of *stare decisis* requires that the said decision should not be questioned at this stage after it was taken to lay down the law in the Presidency for the last 47 years. It goes without saying that owing to various circumstances that exist at present, partial partition has become more common now-a-days. We should be unsettling rights of various persons and title to property in this Presidency should we at present overrule such a decision passed in 1882, as we were invited to do, on considerations of abstract theories regarding joint-family properties and the rights of coparceners, and inferences that should logically follow from the same. It may be mentioned that even in *Appovier's case*[3] the Privy Council were anxious to emphasize the doctrine of *stare decisis*, for at page 90 it is stated:

> "Undoubtedly their Lordships would be unwilling to reverse any rule regarding property which had been long and constantly acted upon in the Courts of the Presidency."

We find that in the present case that the decision in *Manjanatha* v. *Narayana*[1] has never been questioned but has been accepted as correct and acted upon in this Presidency. It will work great prejudice and injustice if such a rule should be reversed on grounds such as those suggested before us.

As regards the case in *Pranjivandas* v. *Ichharam*,[2] evidently there was no decision of the Bombay High Court prior to *Pranjivandas* v. *Ichharam*,[2] such as we have got in Madras. Further Mayukha is a special authority in Bombay.

The question is a difficult one. Injustice could not be totally avoided in whatever way it is answered.

The decision in *Manjanatha* v. *Narayana*[1] has not been discussed in detail either by Mayne, Trevelyan or Ghose. Sir E. J. Trevelyan merely submits that the Bombay view is the better of the two views, whereas Dr. Ghose simply says in Vol. I, page 577 of his book (3rd edition) that the Madras view seems to be more equitable.

In the circumstances I think we should follow the decision in *Manjanatha* v. *Narayana*.[1]

I must however take care to point out that it is not the actual number of shares that is to be taken into account in such cases,

1 (1882) I.L.R. 5 M 362.
2. (1915) I.L R. 39 B. 734
3. (1866) 11 M.I.A. 75.

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but only the share-fraction; otherwise anomalies are likely to occur.

What the fractional share to which any branch would be entitled would depend on the circumstances that exist at the time of partition. A fractional share of such share having been allotted to a member of that branch, it would be entitled only to the remaining fractional share of the fractional share to which it would in the circumstances be entitled in the partition.

As representing one of the four branches, the branch of which the plaintiff, the 10th defendant, and Sudarsana Sah, were members would be entitled to one-fourth of the family properties. A third of the one-fourth was allotted to and taken away by Sudarsana Sah by the partition proceedings of 1910. The plaintiff and the 10th defendant who now represent that branch of the family would be entitled to two-thirds of that one-fourth —that is, two-twelfths of the family properties. The plaintiff is entitled to one-twelfth, his brother the 10th defendant to the other one-twelfth.

My answer to the question referred to the Full Bench is in the affirmative.

A.S.V. *Question answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Halekote Kunhi Kalanda Beari .. *Appellant**
(1st Defendant)

v.

Kunhipakki *alias* Suleman, minor by next friend, Karnavan Kooleri Valiya Peedigayil Abdul Khader Haji and others .. *Respondents*
(Petitioner and Respondents 2 to 9).

Kunhi Kalanda Beari
v.
Kunhipakki.

Execution—Suit on mortgage—Preliminary decree for sale—Subsequent death of one defendant—Only adult legal representatives already on record as defendants in the suit—Another minor son not brought on record as legal representative—Final decree—Sale of the rights of the defendants—Decree and sale whether null and void or bind the entire estate including that of the minor son—Application by the minor son for cancellation of the sale—Power of the Executing Court

A preliminary decree for sale was passed against defendants 1 to 3 in a suit on a mortgage. Subsequent to this, but before the final decree was passed, the 3rd defendant died. His legal representatives were his father who was the 1st defendant, his widow who was the 4th defendant

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*A.A.O. No. 288 of 1927. 13th September, 1929.

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and an infant son. These persons were not brought on record as his legal representatives before the final decree was passed, though two of them who were adults were already on record as the 1st and the 4th defendants. In execution of the final decree the rights of defendants 1 to 3 were sold. The 3rd defendant's infant son who was not brought on record as his legal representative applied to have the sale set aside on the ground that it was null and void.

Held, by Venkatasubba Rao, J, (1) that the provisions of the Civil Procedure Code relating to abatement did not apply to the case, as the death of the 3rd defendant was subsequent to the passing of the preliminary decree in the suit *Perumal Pillay* v. *Perumal Chetty,* (1928) I.L.R. 51 Mad. 701: 55 M.L.J. 253 (F.B.) referred to; and (2) that the estate of the deceased 3rd defendant must be held to have been sufficiently repreesnted by the 1st and the 4th defendants who were the only adult legal representatives of his and were already on the record as defendants in the suit, and that, therefore, the final decree that was passed and the sale that was held were binding upon the entire estate, including that of the infant son *Dip Narain Rai* v. *Lachman Upadhya,* (1925) I.L.R. 47 All. 466 referred to.

Held, by Madhavan Nair, J, that the final decree passed in the suit was not null and void as the 3rd defendant died only subsequent to the preliminary decree, and that, therefore, the objection raised by the infant son of the 3rd defendant could not be gone into by the Executing Court.

Subramania Aiyar v. *Vaidyanatha Aiyar,* (1913) I.L.R. 38 Mad. 682, *Arunachalam Chetty* v. *Abdul Subhan Sahib,* (1925) 50 M.L.J. 232 and *Gora Chand Haldar* v. *Prafulla Kumar Roy,* (1925) I.L.R. 53 Cal. 166 (F.B.) distinguished.

Appeal against the order of the District Court of South Kanara, dated 15th January, 1927, and made in Appeal Suit No. 442 of 1925 preferred against the order of the Court of the District Munsif of Kasargad in R.E.A. No. 192 of 1925, in R.E.A. No. 482 of 1924, in O.S. No. 439 of 1921.

B. Sitarama Rao for appellant.

P. Govinda Menon for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—The question we have to decide arises in execution of a decree passed in a suit brought to enforce a mortgage. The first three defendants in that suit were father, mother and son respectively. The 4th defendant is the wife of the 3rd. The 2nd defendant, the mother, died before the passing of the preliminary decree. The 5th and the 6th defendants, her daughters, were added as her legal representatives, the 3rd defendant, her son, another heir, being already on the record. I may mention, though it is not necessary for the purpose of this case, that the 5th defendant died and her children were brought in her place on the record. It was after these changes in regard to parties that the preliminary decree came to be passed. Subsequent to the passing of that decree, the 3rd defendant died. His legal representatives were his father,

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the 1st defendant, his widow, the 4th defendant and his infant son, who now intervenes in execution and impeaches certain proceedings as being void. On the death of the 3rd defendant no application was made to bring his legal representatives on the record. They were three in number as I have just shown. Two of them who were adults were already on the record. The third, whose name was omitted to be added was an infant. What happened, however, was, that without the 3rd defendant's legal representatives being formally brought on the record, the final decree in the case was passed. In execution of this decree, a certain sale was held. The 3rd defendant's infant son, to whom I have already referred, now applies that the sale may be set aside on the ground that it is null and void.

The first question that arises is, what is the effect of the omission to bring formally the representatives of the 3rd defendant on the record? What the result would have been if such omission had occurred, before the passing of the preliminary decree, it is unnecessary to enquire, although I very much doubt, when the representatives happen already to be on the record, whether O. 22, R. 4 applies and the suit abates, as against the deceased party, on the ground that they were not formally added as such representatives. Here, it was after the passing of the preliminary decree, that the 3rd defendant died; to such a case, it has been held that the provisions relating to abatement do not apply. The principle is thus stated in the judgment of the Full Bench in *Perumal Pillay* v. *Perumal Chetty*[1]:

> "The right of action . . is determined by a preliminary decree because the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree."

The case is then analogous to a party being absent on the record at the stage of execution. A good deal of argument was directed at the Bar to the point, what are the powers of an Executing Court to call the decree in question, first, when it is wholly null and void, and, secondly, when it is merely voidable? Mr. Sitarama Rao contends that in neither case can the Executing Court decide questions relating to the executability of the decree. He next urges, that although he may concede without admitting, that the Executing Court may refuse to give effect to wholly void decrees, in the case of other decrees, its duty is merely to execute them as they stand. The decree before us is clearly not a nullity; and in the present case it is unnecessary to express any opinion on the vexed question regarding the powers of an Executing Court.

1. (1928) I.L.R. 51 M. 701: 55 M.L.J. 253 (F.B.).

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Venkatasubba Rao, J.

The question in this case is not one of procedure but of substance. The cases cited at the Bar as to the proper remedy open to the petitioner need not, in my opinion, be discussed. The question of remedy does not arise unless the party has a right which he can enforce; and it is therefore needless to consider whether S. 47 applies, or whether his remedy is by an independent suit. Having regard to the facts of the present case, the principle applicable is that set forth by the Privy Council in the judgment in *Khiarajmal* v. *Daim.*[2] It is sufficient to state only a few facts of that complicated case. Nabibaksh was one of many defendants to the suit which was brought to enforce a mortgage. On a petition presented by him and others the suit was referred to arbitration. Shortly afterwards, Nabibaksh died leaving two widows, an infant son and a daughter. The names of the widows and son were added to the record but the daughter was omitted. The award was duly made and a decree passed. In execution of that decree, certain sales took place. At the instance of the heirs of Nabibaksh, the question arose in a subsequent suit (the one before the Privy Council), are the proceedings binding upon Nabibaksh's estate? Their Lordships held that notwithstanding that the name of the infant daughter was omitted, the estate was sufficiently represented and that the share of the deceased Nabibaksh in the equity of redemption in the property sold was wholly bound by the sale and irredeemable.

The same principle was applied in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar.*[3] That was a suit upon a mortgage, and before the decree was passed the mortgagor died. The plaintiff thereupon brought the mortgagor's son, the 1st defendant, on the record as his legal representative, and after that a decree for sale was passed. As a fact, the 1st defendant was not the sole representative as the mortgagor had left two other sons and three daughters. In execution of the decree, the mortgaged property was sold and the question arose, whether the sale was binding upon the second son of the mortgagor whose name had not been added. It was held that the mortgagor's estate was sufficiently represented and that the sale passed his entire interest including that of his second son. The learned Judges observe:

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters

2 (1904) L.R. 32 I.A. 23 I.L.R. 32 C 296 (P.C.).
3 (1902) I.L.R. 26 M 230 12 M.L.J. 368.

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on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate. It will of course be open to any other person who is or claims to be the legal representative or one of the legal representatives of the deceased defendant to apply to have his name also entered on the record as a legal representative in the place of the deceased defendant"

It is noteworthy that in the judgment, it is stated that in the case of a Muhammadan family, there is a special need to apply this rule. Otherwise, when a Muhammadan dies leaving innumerable heirs (as not infrequently happens) the omission to bring any one of them on the record may wholly vitiate the proceedings. I refer to this fact specially to show that the contention of Mr. Govinda Menon is without force, that the theory of representation, while it holds good in the case of Hindu joint families, is inapplicable where the parties happen to be Muhammadans. In these two cases which I have quoted, the death occurred before the decree was passed. The rule applies even with greater force when the party, as in the present case, dies subsequent to the decree, that is to say, the decree which declares and determines the rights of the parties. The case which more nearly resembles this is *Dip Narain Rai* v. *Lachman Upadhiya*.[4] After the preliminary decree, the judgment-debtor died and one of his representatives was brought on the record. A final decree was thereafter passed, which, it was held, was binding upon the other representatives whose names had been omitted to be added.

The representation may be incomplete but yet sufficient. Vide *Ramaswami Chettiar* v. *Oppilamani Chetty*.[5] Was the estate then of the 3rd defendant sufficiently represented? He left three heirs, one of them being his minor son, the present petitioner; but the other two, who were brought on the record, were the paternal grandfather and the mother of the minor. They must be held to have sufficiently represented the estate and the decree that was passed and the sale that was held are therefore binding upon the entire estate, including that of the infant son. Mr. Govinda Menon urges strongly that there must be something on the record to show that the Judge, who made the order bringing the representatives on the record, applied his mind to the question and was satisfied that the representation was, in the circumstances, sufficient. There is an obvious fallacy in this argument, for, when the Judge makes the order, it is assumed he is not aware of the existence of other representa-

4. (1925) I.L.R. 47 A. 466

5. (1909) I.L.R. 33 M. 6 at 8· 19 M.L.J. 671.

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Venkatasubba Rao, J.

tives. If he then proceeds upon the footing that the representative whose name he is adding is the sole representative, how can it be said that he has applied his mind to the question of the sufficiency of representation? There is one feature of this case, which, on facts distinguished it from the cases I have referred to. Some of the legal representatives were already here on the record, though, of course, in a different capacity; but in those cases an application for that purpose had to be made. This cannot make any difference in principle. The question is not one of form but of substance. The father and the widow of the 3rd defendant doubtless knew that they were his legal representatives, and I fail to see why on the ground that they were not so described, they should be held not to have represented his estate. A preliminary decree having been passed, they could object to the final decree, only by showing that in the meantime the amount declared to be due had been paid. It is not alleged that any such payment was made and that the decree should not have been made absolute. There is no reason for holding that there was not sufficient representation when the only adult representatives were on the record, and, having no defence to make, allowed a final decree, in the usual course, to be passed. The minor, therefore, cannot question the sale which, as I have shown, is binding upon him. The appeal is allowed with costs throughout.

Madhavan Nair, J.

Madhavan Nair, J.—I agree. In this case a preliminary decree for sale on a mortgage was passed against defendants 1 to 3. Before the final decree was made, the 3rd defendant died. His legal representatives were his father, the 1st defendant, his widow, the 4th defendant, and an infant son who now takes objection in the execution proceedings. These were not brought on record as legal representatives before the final decree was passed though two of them who were adults were already on record. In execution of the final decree the rights of defendants 1 to 3 were sold. The respondent, the son of the deceased 3rd defendant whose name was omitted to be brought on the record as a legal representative of the 3rd defendant now objects to the sale. The question for consideration is whether the objection raised by him regarding the validity of the decree can be gone into in execution. The District Judge relying on two decisions of this Court, *Subramania Aiyar* v. *Vaidyanatha Aiyar*[6] and *Arunachalam Chetty* v. *Abdul Subhan Sahib*[7] and also on the decision of the Calcutta High Court in *Gora Chand Haldar*

6. (1913) I.L.R. 38 M 682. 7. (1925) 50 M.L.J. 232.

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v. *Prafulla Kumar Roy,*[8] came to the conclusion that the objections raised by the respondent could be heard and decided by the Executing Court. The decisions quoted are inapplicable to the present case as the decrees in those cases were void decrees and the Court had no jurisdiction to pass such decrees. The same cannot be said about the decree in the present case. Though the respondent was not brought on record as the legal representative of the 3rd defendant in the suit before the final decree was passed, the decree cannot be said to be an absolute nullity on that ground. It is to be noticed that the 3rd defendant was on record at the time when the preliminary decree was passed and that he died only subsequently. It was held in *Perumal Pillay* v. *Perumal Chetty*[1] that Order 22, Rules 3 and 4 of the Code of Civil Procedure do not apply to cases of death after the passing of the preliminary decree in a suit. According to the opinion of the Full Bench:

"The right of action . . is determined by a preliminary decree because the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree"

If so, the decree passed in this case cannot be objected on the ground that it is a void decree and that the Court had no jurisdiction to pass such a decree. It follows that the objection raised by the respondents cannot be gone into in execution. This appeal must therefore be allowed with costs throughout.

In this view I do not discuss the question whether the final decree in this case is a valid decree binding on the respondent, having regard to the fact that the other legal representatives of the deceased 3rd defendant, viz., the 1st and the 4th defendants, were already on record though they were not formally brought on record as legal representatives.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Ranga Raju and another .. *Petitioners* (Defts.)*

v.

Ethirajammal .. *Respondent (Plff.).*

Ranga Raju v. Ethirajammal.

Court Fees Act (V of 1922), Sch. II, Art 11—Mortgage suit—Order that a final decree shall be passed—Appeal—Court-fee payable

An appeal against an order directing after contest that a final decree shall be passed in a mortgage suit should be treated only as an appeal against an order, and not as an appeal against the final decree in the suit for the purpose of the payment of Court-fee

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*C.R.P. No 107 of 1929 23rd September, 1929.

1 (1928) I.L.R. 51 M 701 · 55 M.L.J. 253 (F.B)

8 (1925) I.L.R. 53 C. 166 (F.B.).

Ranga Raju v. Ethirajammal.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Chingleput, dated 27th November, 1928, in A.S. No. 191 of 1928 (M.P. No. 279 of 1927 in O.S. No. 73 of 1926 on the file of the Court of the Subordinate Judge of Chingleput).

K. P. Ramakrishna Aiyar and *N. Ramachandra Aiyar* for petitioners.

T. G. Aravamuthan for respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition was presented in the following circumstances. The plaintiff, now respondent, obtained a preliminary mortgage decree against the petitioner, and applied in M.P. No. 279 of 1927 to have a final decree passed. The defendants were given notice and alleged that the decree debt had been adjusted. This issue was tried by the Subordinate Judge of Chingleput and found against, so that he directed that a final decree should be drawn up. The petitioners took this order on appeal to the District Court, stamping it as though for a Miscellaneous Appeal. The learned District Judge took up the matter of the sufficiency of the Court-fee and passed an order in which he says that the appeal was clearly against the final decree in the mortgage suit and accordingly that an *ad valorem* Court-fee should be paid. The petitioners now object to the terms of this order.

The question thus is, whether an appeal against an order directing after contest that a final decree shall be passed in a mortgage suit should be treated as an appeal against the final decree in that suit. Not much guidance can be obtained from reported cases. The learned District Judge has referred to *Bajrangi Lal* v. *Mahabir Kunwar,*[1] but all that that lays down is that an appeal from a final decree in a mortgage suit passed under Order 34, Rule 5, Code of Civil Procedure, requires an *ad valorem* Court-fee, a proposition which need not be disputed. In *Subbalakshmi Ammal* v. *Ramanujam Chetty*[2] Spencer and Krishnan, JJ., had to deal with an order dismissing an application for a final decree in a suit for sale on a mortgage from the point of view of its appealability and there indeed they did hold that the effect of the order was to dismiss the suit, thereby being technically a decree and appealable. I do not, however, find that case of much assistance here, because although the effect of the order here no doubt would be that a final decree

1 (1913) I.L.R. 35 A 476.
2 (1918) I.L.R. 42 M 52. 35 M.L.J. 552.

Ranga Raju v. Ethirajammal.

must be passed, it can hardly be said that this appeal is tantamount to an appeal from that decree. We have only to consider what the permissible grounds in each case would be. In this appeal against the order, the grounds must necessarily be limited to adducing cause why the final decree should not be passed; whereas once the decree is passed and an appeal is preferred against it, grounds such as those would not avail the appellant, but he must attack the merits of the decree. I think it is quite clear, therefore, that the scope of an appeal against the order would be different from that against the decree and further that the judgment-debtor has a right of appeal against both. To charge him *ad valorem* fees in this appeal would mean, if he appealed against the decree, he would have to pay them twice over, which I do not think can be correct. I must accordingly allow the petition and decide that the appeal preferred to the District Judge was properly stamped and direct him to restore it to file and dispose of it according to law.

Petitioners will get their costs in this petition.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

N. Purushothama Rao .. *Appellant* (Deft.)*

v.

Mallavarapu Rama Rao and another .. *Respondents (Plffs.).*

Purushothama Rao. v. Rama Rao.

Hindu Law—Joint family—Partition—Suit for, by sons against their father and uncle—One of sons a minor and represented by the other a major—Death of minor pending suit—Right to his share—Father or surviving brother entitled—Father—Sale for antecedent debts by—Validity against sons of—Pressure for sale—Proof of—Necessity

Two brothers, one of whom was a minor and was represented by the other, a major, sued their father and their uncle, *inter alia*, for partition Pending the suit, the minor brother died, and the Court below gave a decree to the surviving brother for partition and possession of his share of the properties that were allotted to his branch. In an appeal filed by the surviving brother against the decree of the Court below, he contended that he was entitled to the deceased brother's share by survivorship.

Held, that the surviving brother had gone out of the family and the deceased remained with the family, and that consequently the share of the deceased vested in the father by survivorship

Until the decree is passed one cannot say that the minor's interests are divided from the rest of the family

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*Appeals Nos. 256, 257 and 363 of 1927. 4th April, 1929.

Puru-shothama Rao v. Rama Rao.

Whatever may be the law as to the right of a manager to sell family property when there was no pressure, a father can certainly sell for discharging antecedent debts Such a sale cannot be held to be invalid as against the sons on the ground that there was no pressure for the sale

Bandhu Ram v. *Ram Kishun Sonar*, (1923) 21 All. L J. 354 dissented from.

Appeals against the decree of the Court of the Subordinate Judge of Nellore in O.S. No. 43 of 1925 (O.S. No. 13 of 1925, District Court, Nellore).

K. V. Venkatasubrahmania Aiyar for appellant.

B. Somayya for respondents.

The judgment of the Court was delivered by

Ramesam, J

Ramesam, J.—These three appeals are filed against the judgment in O.S. No. 43 of 1925 on the file of the Subordinate Judge's Court of Nellore. The original plaintiffs were two brothers. The first was a major and the second a minor appearing by his elder brother as next friend. The 2nd plaintiff died during the pendency of the suit. The 1st defendant was their father, the 2nd defendant was the brother of the 1st defendant and the other defendants were the alienees of defendants 1 and 2. The 8th defendant was the special Receiver appointed in the Insolvency Proceedings in connection with the insolvency of the 1st defendant who became insolvent while the suit was pending. The suit was filed to declare that the partition between the 1st defendant and the 2nd defendant in 1915 was unfair and therefore not binding on the plaintiffs, to set aside certain alienations made by defendants 1 and 2 and also for a partition of the shares of plaintiffs 1 and 2 and recovering possession of them. The Subordinate Judge found that the partition of 1915 was fair and binding on the plaintiffs and on that footing gave a decree to the 1st plaintiff for partition and possession of his share of the properties that were allotted to his branch. Appeal No. 256 was filed by the Receiver (8th defendant), Appeal No. 257 was filed by the 1st plaintiff and Appeal No. 363 was filed by one of the alienees, the alienation in whose favour was declared not to be binding on the plaintiffs. We will now take up these appeals in order.

In Appeal No. 256 the only point raised by the 8th defendant is that provision should be made in the decree for the discharge of the 1st defendant's debts out of the joint family properties and that the decree for partition should be only of the rest of the properties that remained after provision is made for the payment of the debts. The 8th defendant filed a written statement in the Court below saying that as the main object of the suit was to have the partition of 1915 and the alienations made

Purushothama Rao v. Rama Rao. — Ramesam, J.

by the 1st defendant declared invalid and to have them set aside and not a partition between the 1st defendant and his sons, the validity and binding nature of the debts cannot be gone into in this suit. Apparently, at the time when issues were framed with reference to this allegation the parties did not think it necessary to raise an issue relating to the debts. The result was that all the parties and the Subordinate Judge thought that no inquiry about the debts was necessary and the decree passed does not make any provision for any enquiry and the preliminary decree is a pure decree for partition. Now the 8th defendant wants such a provision to be inserted. We think it is too late. After all, the creditors do not suffer by our refusing to adopt the course suggested and it does not injuriously affect the interests of any parties. This appeal is therefore dismissed with costs. The Receiver may pay the costs and take his own costs from the estate of the insolvent.

In Appeal No. 257 the 1st plaintiff is the appellant. He argues that he never intended to separate from his younger brother but his object was that he and his younger brother should be separated from his father and therefore he was entitled to two-thirds of the properties that were allotted to his branch or at any rate half of them and the 1st defendant half. We think that both these contentions are not well founded. The 2nd plaintiff, being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor one can well say that the minor has become divided; but until the decree is passed one cannot say that the minor's interests are divided from the rest of the family.

The 1st plaintiff has divided from the rest of the family. The result is that 1st plaintiff went out of the family and the 2nd plaintiff remained with the family, and consequently the share of the 2nd plaintiff vested in the 1st defendant by survivorship. The Subordinate Judge is right in his conclusion. This point therefore fails.

The second point argued for the 1st plaintiff is that the alienation in favour of the 6th defendant was nominal. We think that the Subordinate Judge is right in the conclusion he arrived at. His reasons are given in paragraph 14 of his judgment with which we agree.

The third point is that the partition of 1915 was really unfair. Here also we agree with the conclusion of the Subordinate Judge. The result is Appeal No. 257 also fails and is dismissed with costs.

Some grounds are taken against the 3rd respondent. So far as that item is concerned, the 3rd respondent will be entitled to get costs proportionate to that item. The other respondents will get their proportionate costs, *i.e.*, proportionate to their interests.

Purushothama Rao v. Rama Rao. — Ramesam, J.

Appeal No. 363 of 1927 is by the 5th defendant. His sale-deed is Ex. V. It was effected for the purpose of discharging the prior mortgage debt under Ex. I. It is also not disputed that the consideration for the sale-deed was paid in discharge of the mortgage debt as the endorsement on the deed shows. The Subordinate Judge following the decision in *Bandhu Ram* v. *Ram Kishun Sonar*[1] has held that there was no pressure for the sale and therefore the sale was not binding on the plaintiffs. Whatever may be the law as to the right of a manager to sell when there was no pressure, a father can certainly sell for discharging antecedent debts as here. There is no question about the existence of the antecedent debt or of the fact of its having been paid off. We do not agree with the decision in *Bandhu Ram* v. *Ram Kishun Sonar*.[1] We allow this appeal and hold that this sale is binding on the plaintiffs. We direct that this item be excluded from partition.

The 5th defendant will have his costs in appeal and in the Court below.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

S. Natarajan and others .. *Appellants* (Respdts. Nos. 2, 3 and 4)*

v.

V. Narasimha Aiyangar, Official Liquidator of the City Hygienic Milk Supply Co., Ltd., Madras .. *Respondent (Petnr.).*

Natarajan v. Narasimha Aiyangar.

Indian Companies Act (VII of 1913), Ss 3, 187, 199, 200 and 201—Order by High Court for payment by contributory in respect of a call—Application for enforcement of the order against the property of the contributory situated in the mofussil—Jurisdiction of the mofussil District Court—Objection to jurisdiction taken at the commencement—Proceedings, if validated

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*A.A O. No. 237 of 1929. 23rd August, 1929

1 (1923) 21 All. L. J. 354.

Natarajan v. Narasimha Aiyangar.

The only Court which can enforce an order passed by a High Court under S. 187 of the Indian Companies Act ordering the payment by a contributory in respect of a call against the property of the contributory situated in a mofussil district in that province is that High Court and not the District Court of that mofussil district.

Kayastha Trading and Banking Corporation, Gorakhpur v *Jai Karan Lal*, (1926) I.L.R. 6 Pat. 132 relied on

Section 3 (3) of the Indian Companies Act has not the effect of validating the proceedings taken in the mofussil District Court to enforce such an order passed by the High Court of that province, if the objection to the jurisdiction of that mofussil Court was taken at the very commencement and at the proper time

Appeal against the order of the District Court of West Tanjore, dated the 22nd day of March, 1929, in E.P. No. 168 of 1928, in O.P. No. 62 of 1922.

N. Suryanarayana for appellants.

C. S. Venkatachari for respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The short question is: What is the effect of sections 199, 200 and 201 of the Indian Companies Act read with section 3?

An order was made by the High Court under section 187 ordering the payment by a contributory in respect of a call. He has property in the District of Tanjore against which the Liquidator can proceed. The latter accordingly produced the order before the District Judge and applied for its execution. The Judge overruling the objection of the contributory held that he had jurisdiction to enforce the order.

We have to decide whether the order of the District Judge is right. It is stated by both sides that the only relevant provisions of the Act bearing on the question are the four sections to which we have referred. To them, therefore, we propose to confine our attention. The decision really turns on the meaning of section 200 read in the light of section 3.

The relevant portion of the former section runs thus:

"Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place"

Let us apply the section to the facts of this case. The order was made by the High Court in the course of the winding up. It is sought to be enforced in Tanjore. Under the section, which is the Court that can enforce it? The answer is: "The Court that would have had jurisdiction in respect of such company, if its registered office had been situate at Tanjore."

Natarajan v. Narasimha Aiyangar.

Venkatasubba Rao, J.

What then is that Court? The answer to this question is furnished by section 3, which reads thus:

"The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate."

In other words, if the registered office of this company is situate at Tanjore, the Court having jurisdiction under the Act, would be the High Court. From the foregoing statement, it follows that the only Court that can enforce the order in question against property at Tanjore is the High Court of Madras. We do not propose to decide the question, in what manner, in the event of an application being made to the High Court, is the order to be enforced, by direct action or by its being transmitted to the Tanjore Court? That is a point which does not arise at present. We fail to see how sections 199 and 200 relied upon by Mr Venkatachari support his contention. The section that confers jurisdiction is section 200 and the other two sections referred to by the learned Advocate merely deal with the mode of enforcing the orders. This, in our opinion, is the proper construction of these previous sections.

The view we have taken receives support from *Kayastha Trading and Banking Corporation, Gorakhpur* v. *Jai Karan Lal*.[1] Mr. Venkatachari asks what purpose then does section 200 serve? The answer is simple. It obviously can apply to a case where an order made by the High Court of one province is to be enforced in another province; and as the Patna High Court in the decision we have cited has pointed out, in such a case it can only be enforced by the High Court of that other province.

Lastly, Mr. Venkatachari seeks to support the order of the Lower Court by relying upon section 3, clause (3), which says:

"Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court"

It is very doubtful whether this clause applies to a case of this kind. In any case, it can have no application, as the Patna case has decided, when the objection was taken at the very commencement and at the proper time.

This appeal is allowed with costs.

The act of the Official Liquidator in applying to the Lower Court is *bona fide* and we, therefore, allow him to take his costs out of the estate.

N.S. *Appeal allowed.*

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1 (1926) I.L.R. 6 Pat 132.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUNDARAM CHETTY.

Sri Saladi Nagabushanam .. *Appellant* in Second Appeals Nos.* 1671 *and* 1672 *of* 1927 *(Plff.)*

v.

Vardhinidi Venkanna and another .. *Respondents (Defts.).*

Sri Saladi Nagabushanam v. Vardhinidi Venkanna.

Madras Elementary Education Act (VIII of 1920*), S* 36*—Rule framed under the section—Education cess levied and recovered by Government from landholder—Right of landholder to recover one-half of it from the ryots*

A landholder is not entitled to recover from the ryots one-half of the education cess which the Government has levied and recovered from him, unless under a special contract entered into with them The rule framed under section 36 of the Madras Elementary Education Act does not declare that the education cess is *ipso facto* land cess or shall be deemed to be land cess for all purposes, but the scope of the rule is confined to the procedure to be adopted for the levy and recovery of this cess

Second Appeals against the decrees of the District Court of West Godavari at Ellore in Appeal Suits Nos. 41 and 40 of 1927 preferred against the decrees of the Court of the Sub-Collector of Narsapur in Summary Suits Nos. 98 and 99 of 1926.

B. Satyanarayana for appellant.

V. Govindarajachari for respondents.

The Court delivered the following

JUDGMENT—The plaintiff is the appellant in both these appeals. The two suits filed by him are for the recovery of rent and cess from the ryots (defendants). The only question in dispute in these second appeals is whether the plaintiff is entitled to recover one-half of the education cess which the Government has levied and recovered from him. It would appear from the judgment of the Lower Appellate Court that it was conceded on behalf of the plaintiff that he is not entitled to recover land cess from the defendants. The defendants have set up a contract or agreement by which the plaintiff's predecessor's-in-title agreed not to collect land cess from them. That agreement was no doubt prior to the passing of Act VIII of 1920 which is the Madras Elementary Education Act. Under Section 34 of this Act, the education tax can be levied in the area which is not within a municipality not exceeding 25 per cent. of the taxation leviable in that area, under all or any of the following heads, namely, land cess, tax on companies, professional tax and house tax. This section does not specify

*Second Appeals Nos 1671 and 1672 of 1927. 13th September, 1929

from whom such a tax can be levied. In section 36 it is stated that the assessment and realisation of taxes leviable under section 34 shall be in accordance with the procedure prescribed. That procedure appears to have been prescribed under a rule which was framed under section 36. The rule is to this effect, namely—

"the tax levied by a local authority under S. 34 of the Act under any head of taxation specified therein shall be treated as an addition to the tax levied under the heads by the local authority under the law for the time being in force governing it, and shall be assessed and recovered along with the said tax as an integral part of it."

The question at issue has to be decided upon a proper interpretation of this rule. It must be borne in mind that this rule is one framed under section 36 which only relates to the procedure prescribed for assessment and realisation of the tax. The scope of this rule, therefore, is confined to the procedure to be adopted for the levy and recovery of this tax and cannot be extended further. It says that the education tax can be recovered along with the taxes already in force, for instance, land cess. This education tax should be treated as an addition to the land cess and is recoverable along with the said land cess as an integral part of it. That being so, it seems to me that this rule does not declare that the education tax is *ipso facto* land cess or shall be deemed to be land cess for all purposes. If an amount is due to the Government under the Land Improvements Loans Act, that amount is recoverable as an arrear of revenue. It is only the procedure prescribed for the recovery of the arrears of revenue that should also be adopted for the recovery of those dues. It has been held that by reason of the identical procedure for their recovery, such dues do not become arrears of revenue for all purposes. Similarly, by reason of the aforesaid rule framed under section 36 of the Act it cannot be urged that the education tax has been declared by Statute to be land cess itself. In this view it has to be seen whether the plaintiff has got any right to recover from the tenants a portion of the education tax levied from him. In the case of land cess there is the express provision in section 88 of the Madras Local Boards Act XIV of 1920 in the second proviso which enables a landholder to recover from his tenant one-half of the land cess payable by him in respect of the land occupied by the tenant. But for this proviso the landholder will have no right to recover any portion of it from the tenant, unless under a special contract entered into with him. With respect to land cess, there is a statutory right given to the landholder to recover one-

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half of it from the tenant, but as to educational tax leviable under Act VIII of 1920 there is no statutory provision to enable the landholder to collect any portion of it from the tenant. The plaintiff's claim to recover one-half of the education tax from the defendants should be based either upon a contract or upon a statutory liability. Neither of them exists in this case. It is therefore clear that the plaintiff's claim with respect to education cess is unsustainable.

Even if it should be held that, by reason of the rule framed under section 36 of the Act referred to above, the education tax must be deemed to be land cess itself or a portion of it, the plaintiff would still be prevented from recovering any portion thereof from the defendants by reason of the agreement which disentitles him to recover the land cess from the defendants. The contract seems to be that no land cess should be recovered from the defendants. If it be so I must hold that there was no reservation to the effect that that contract should be confined only to the amount which was then levied as land cess. Unless such a reservation is satisfactorily established, it must be presumed that whatever amount was levied under the head of land cess was waived under that contract. In the view I have taken above it is not quite necessary to deal with the contract on the basis that education cess is land cess itself. I have, however, dealt with this aspect, as it was also the subject of arguments before me. In any view the plaintiff would not be entitled to recover any portion of the education tax from the defendants.

In the result, the Second Appeals are dismissed with costs.

N.S. *Second appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Kemgam Swamy and others .. *Appellants* (Counter-petitioners)*

v.

Vaddadi Subbamma and others .. *Respondents (Petitioners-Counter-petitioners).*

Kemgam Swamy v. Vaddadi Subbamma.

*Mesne profits—Decree awarding—Decree directing inquiry into mesne profits if amounts to a—Mesne profits—Decree for, without qualifying words—Future profits if also awarded by—Civil Procedure Code, O 20, R 12—Decree directing inquiry into mesne profits in execution proceedings in contravention of—Not a nullity—*Res judicata*—Application for ascertainment of mesne profits and for passing of final decree—Rejection of, as not being in proper form—Subsequent application for same relief—Not barred.*

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*A.A.O. No 432 of 1927. 21st August, 1929.

Kemgam Swamy v. Vaddadi Subbamma

An order directing enquiry into mesne profits necessarily involves an award of those profits.

Held, therefore, in a case in which a decree for possession contained a direction that "the mesne profits will be determined by a separate enquiry in execution proceedings," that there was an effective decree for mesne profits.

Held further, that that portion of the decree, though it was in contravention of the provisions of O 20, R. 12 of Civil Procedure Code, was not a nullity.

Failure to conform to the provisions of O. 20, R. 12 of Civil Procedure Code is a case of an irregular exercise of jurisdiction and not a case of total want of jurisdiction.

A decree which grants mesne profits without qualifying words must be construed to have granted subsequent as well as past profits

An application, headed "E A.," filed by the decree-holder for the determination of past and future profits and for the passing of a decree accordingly, was rejected on the ground that an "E P" was necessary and that the petition as presented was not maintainable.

Held that that order of rejection was no bar to a subsequent application properly presented for the same relief, because the prior application was not disposed of on the merits.

Appeal and Memorandum of Objections preferred against the Order of the Court of the Subordinate Judge of Vizagapatam, dated 13th October, 1927, in E.P. No. 36 of 1927, in O.S. No. 28 of 1919.

T. Rangachariar and *V. Govindarajachari* for appellants.

G. Lakshmanna, Y. Suryanarayana and *B. V. Ramanarasu* for respondents.

The Court delivered the following

JUDGMENTS. *Venkatasubba Rao, J.*—The point arises in execution. Is the plaintiff entitled to mesne profits under the decree? The learned Subordinate Judge has upheld the plaintiff's claim and the correctness of his order is called in question in this appeal.

Venkatasubba Rao, J.

A few facts may be stated. The plaintiff, who was a minor at the date of the suit, claimed her deceased husband's properties from the defendants, who were alleged to have been in unlawful possession. Her husband died in 1913 and the suit was filed in 1919. Judgment was delivered for the plaintiff on the 10th February, 1922, directing delivery of possession of certain immoveable properties. The judgment contains a further direction which is now material. It runs thus:

"The mesne profits will be determined by a separate inquiry in execution proceedings"

An appeal, A.S. No. 220 of 1922, was taken to the High Court and in 1925 the judgment of the Trial Court was confirmed subject to a slight modification, which I need not notice.

Kemgam Swamy v. Vaddadi Subbamma. — Venkatasubba Rao, J.

The plaintiff applied to the Lower Court on 6th April, 1927 by way of execution of the decree, for mesne profits *past and future;* in other words, she filed an execution petition claiming those profits The learned Subordinate Judge, as I have said, has made an order, dated 13th October, 1927, in her favour. The appellants attack that order on five distinct grounds and I shall proceed to deal with each of them.

It is first contended that there is no effective decree in respect of mesne profits capable of execution but the direction to which I have referred awards profits by necessary implication. The order directing enquiry into mesne profits necessarily involves an award of those profits; for, why should there be an enquiry unless the profits were assumed to have been awarded? The decree must be construed in a reasonable sense and as Mr. Lakshmanna for the 1st respondent points out, should a different view be taken, the direction in the decree would be entirely futile. This is a result that every Court must avoid, if possible.

It is next contended that under the Code of Civil Procedure it was in excess of the Court's powers to direct an enquiry into profits in execution proceedings. On this point, the present Code, departing from the previous one, clearly lays down that mesne profits should be awarded by the decree itself, implying, that the enquiry should not be postponed to the stage of execution. But unfortunately, Courts in the mofussil frequently frame their decrees, as if the old Procedure Code is still in force in this respect and this repeatedly leads to trouble. While deploring this practice, we must still ask ourselves, is it a question of complete want of competency, or, of erroneous exercise of jurisdiction? The distinction between absence of jurisdiction and irregular exercise of jurisdiction has been frequently pointed out. If the Court fails to conform to the provisions of Order 20, Rule 12, it is impossible to hold that the defect is one of inherent incompetency. I agree with *Lakshmibai* v. *Ravji Bhikaji*[1] and hold that if a Court passes an order in contravention of that provision, it is not a nullity owing to a total want of jurisdiction. That the Court is competent to award mesne profits cannot be doubted, but in exercising that undoubted jurisdiction it adopts a wrong procedure. Thus, it is a case of mere irregular exercise of jurisdiction; and from this it follows that the executing Court cannot go behind the decree to which it is bound to give effect in execution. If

1. (1928) 31 Bom. L.R. 400.

Kemgam Swamy v. Vaddadi Subbamma. — Venkatasubba Rao, J.

Ganga Prasad Dutt v. *Rani Hemangini Debi*[2] takes a different view (which I doubt) I respectfully dissent from it.

The third objection of the appellants relates to the form of the proceeding. They contend that, notwithstanding the error in the decree, the application for an enquiry into mesne profits should have been made in the suit itself. As the plaintiff filed instead, an execution petition, it is urged that it is incompetent. This contention receives support from *Ramachandra Raju* v. *Sri Raja Mantripragada Bhujanga Rao*.[3] But as on the facts of this case no further point is involved such as limitation, it is clearly open to the Court to allow a mistake of this kind to be repaired and treat the petition as an application in the suit This is the view of the learned Subordinate Judge and I unhesitatingly accept it. Moreover, as he points out, when the parties came to Court on a previous occasion, the defendants objected that the plaintiff should seek relief by filing an execution petition. Apart from the inconsistency involved in their position, I am satisfied that the present contention must be rejected.

The fourth objection, namely, that the application is barred by *res judicata,* is equally untenable The facts that bear on this point may be briefly stated. There was a previous petition filed by the plaintiff for an enquiry into mesne profits and for the passing of a final decree (E.A. No. 1120 of 1926). This is precisely what is contemplated by Order 20, Rule 12 of the present Code. Such a petition pre-supposes that the request is made in the suit itself and not in execution. But the decree having followed the old Code, the plaintiff's application, though, as I have said, must be deemed to have been made in the suit, was wrongly described as one in execution; that is, it was called an "E.A." (execution application). To this, objection was taken by the judgment-debtors, namely, that the heading should have been not "E.A." but "E.P." Rule 3 of the Civil Rules of Practice says thus:

> (1) Execution petition means a petition to the Court for the execution of any decree or order.
>
> (2) Execution application means an application to the Court made in a pending execution petition.

The form adopted by the plaintiff is that prescribed by Rule 149 which deals with execution applications. The chief feature, on the other hand of an execution petition, as is well known, is the tabular form referred to in Order 21, Rule 11,

2. (1917) 37 I.C. 997. 3. (1923) 46 M.L.J. 46.

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Civil Procedure Code. The objection that was urged, as I have pointed out, was that the heading should have been "E.P." and not "E.A." An objection more plausible might have been taken, namely, that the plaintiff's request conformed to the present Code, whereas the decree was framed under the repealed provision. But it must be noted that this seemingly valid objection was not the one taken. But the objection raised was upheld by the Court and the following order, dated 22nd March, 1927, was made:

"As admitted by the decree-holder's vakil an E P is necessary and this petition is not maintainable The petition is rejected"

The above order becomes intelligible when it is remembered that "E.P." is used in it, as distinguished from "E.A." Every one concerned missed the substance of the thing and it is now said that this order operates as *res judicata*. The previous order decided nothing beyond stating what the form of the petition was to be. As I have pointed out in dealing with objection No. 3, the order itself was misconceived, for what the plaintiff was competent to file was not an E.P. but a petition in the suit itself. Be that as it may, I fail to see how the previous order can possibly bar the present application. There was no decision in any sense on the merits and in such circumstances, as held in the case already referred to *Ramachandra Raju v. Sri Raja Mantripragada Bhujanga Rao*,[3] the rule of *res judicata* cannot apply.

The fifth objection of the appellants now remains to be dealt with. Mr. Rangachari on their behalf contends that in any event the plaintiff cannot, under the decree as it stands, obtain mesne profits subsequent to the suit. There is some force in what Mr. Lakshmanna suggests that this objection is a clear after-thought; for, certain previous proceedings show that the defendants equally with the plaintiff understood the decree as granting both past and future profits. But still the question is, what is the true construction of that decree? In the plaint, the claim was confined to past mesne profits and the relief was valued with reference to such profits only. The Lower Court refers *inter alia* to the fact, that the plaint contains a prayer in general terms, "that the Court may grant such other relief as it deems fit and reasonable." On this circumstance I do not propose to rely. The decree, however, relates to mesne profits generally. The question is, what is the rule applicable to the construction of such a decree?

3. (1923) 46 M.L.J 46.

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The leading case on the point is the decision of the Privy Council in *Fakharuddin Mahomed* v. *The Official Trustee of Bengal.*[4] In clear and unequivocal terms their Lordships declare:

"That possession with wasilat (mesne profits) means wasilat up to the time of possession being delivered"

The reasoning adopted is this. Whether the plaint contains or not a claim to future profits, the power to grant them vests in the Court. Subsequent profits as the very term implies are profits accruing subsequent to the institution of the suit. There is no cause of action as regards such profits at the time of the filing of the plaint. It is by virtue of a special provision that such profits can be claimed or awarded. (See *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose*[5]). This is an exception to the general rule that the relief granted is confined to rights accruing before the date of the suit. The Legislature has expressly enabled the Courts to grant such relief with the beneficent object of preventing unnecessary litigation. Therefore, the Court must, while passing the decree (unless a contrary intention is manifest) be deemed to have exercised its powers to the full, for otherwise, its decree fails to give effect to what is plainly the intention of the legislature. Their Lordships observe:

"Wasilat, by law, is demandable up to the time of possession; and the question is, whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is, that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession"

Their Lordships next cite two cases and to one of them I shall refer. In *Dhurm Narain* v. *Bundhoo Ram,*[6] in the plaint, mesne profits were claimed only to the date of the institution of the suit. The decree passed was "one for possession of land with wasilat." The question arose in execution, just as in the present case, is the plaintiff entitled to subsequent mesne profits? Jackson, J., with whom Markby, J., concurred, states the law thus:

4. (1881) L.R. 8 I.A. 197: I.L.R. 8 C. 178 (P.C.).
5. (1910) I.L.R. 43 C. 650 at 655.
6. (1869) 12 W.R. 75.

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"When the Court in its decree ordered that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such mesne profits down to the date of the delivery of possession."

In short, the decree, when it awards mesne profits without qualifying words, must be construed to have granted past as well as subsequent profits. The case relied on by Mr. Rangachariar, *Sadasiva Pillai* v. *Ramalinga Pillai*,[7] does not militate against this view, for, what it lays down is, that if future profits are not awarded by the decree, the Court cannot grant them in execution. This is not a case bearing on the construction of the decrees relating to mesne profits. As a matter of fact, this was one of the cases relied on for the appellant in the course of the argument in the case already cited *Fakharuddin Mahomed* v. *The Official Trustee of Bengal*.[4] Their Lordships explain that case by observing that there the decree was silent on the subject of wasilat and it could not therefore be added in the course of the execution. (*See* page 207). That ruling throws no light on the construction of the decree which says, "possession with wasilat," which, upon a reasonable construction, means "wasilat up to the time of possession being delivered." Mr. Rangachari has been at pains to distinguish this case *Fakharuddin Mahomed* v. *The Official Trustee of Bengal*[4] on the ground that the decree was construed with reference to particular plaint before the Court. In that case, as in this, mesne profits were claimed only up to the date of the suit. Similarly, there, as here, in valuing the relief, only past profits were taken into consideration. But the suit was described as brought to obtain possession of the Zamindari "and the mesne profits thereof," that is, mesne profits generally. Their Lordships in the earlier part of their judgment observe that the plaint is capable of being construed as containing a comprehensive claim for mesne profits. Their Lordships recognise that this is too slender a ground for resting their judgment on and they therefore begin their discussion on the subject, with the significant words "But be that as it may." (*See* page 206). The view I am taking receives support from *Pramada Nath Roy* v. *The Secretary of State for India*,[8] especially the judgment of Cumming, J., in that case. (For the learned Judge's observations on this point see *Pramada Nath Roy* v. *Secretary of State for India*.[9] The report in *Pramada Nath Roy* v. *The Secretary of State for India*[8] does not contain the relevant passages.)

4. (1881) L.R. 8 I.A. 197: I.L.R 8 C 178 (P C)
7 (1875) L.R. 2 I A. 219 8 (1926) I L.R. 53 C 992.
9. A.I.R. 1927 C. 182 at 183.

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Mr. Rangachari next contends that unless there is an express prayer for subsequent profits, they cannot be awarded under Order 20, Rule 12 by the decree. He argues that this result follows from the wording of the present section, which, it is said, is different from that of the repealed provisions. I cannot accede to this contention. Such difference as exists in the language is due solely to the fact that the subject-matter of two sections in the previous Code (sections 211 and 212 of the Code of 1882 and sections 196 and 197 of the Code of 1859) was condensed into the limits of one section in the present Code. Moreover, even as a matter of strict construction, a suit for past mesne profits is surely a suit for mesne profits (under Order 20, Rule 12); for the words "mesne profits" include past profits. I am therefore clearly of the opinion that the Lower Court's conclusion is right.

The result is that the appeal is dismissed with costs and the Memorandum of Objections is also dismissed, but I make no order as to costs.

Madhavan Nair, J.

Madhavan Nair, J.—This appeal arises out of execution proceedings. The decree-holder respondent instituted O S. No. 28 of 1919 in the Sub-Court, Vizagapatam, for possession of properties with mesne profits. In the plaint—see para. 3 (*h*)—she claimed specifically past profits from 1914 to 1919. The plaint was silent regarding future mesne profits. In the schedule relating to the valuation of the suit for purposes of Court-fee and jurisdiction the amount of past profits for the years 1914 to 1918 was included as one of the items. The Subordinate Judge passed a decree in the plaintiff's favour. The relevant portion of the decree is as follows:

"This Court doth order and decree that the plaintiff do recover possession of the suit properties described in Schedules A and B except items 9, 14, 16 and 19 of the Plaint A Schedule hereto attached . . . It is further ordered that the mesne profits be determined by a separate enquiry in execution proceedings"

On appeal (A.S. No. 220 of 1922) this decree was affirmed with a slight modification by the High Court on 31st July, 1925. It was found that the plaintiff was entitled to recover a portion of item 16 also. The judgment of the High Court referring to this modification is as follows:

"The decree of the Lower Court will therefore be amended by reading for 'Item 16,' 'the portion of item 16 covered by Ex 19' The Lower Court directed that mesne profits should be determined separately in execution. As regards this No 16 it will be for consideration when mesne profits are determined whether the plaintiff should be given mesne profits from this date or from the date of the decree or from any other date, seeing that she neglected to make this application earlier."

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The application out of which this appeal arises was made by the decree-holder for the ascertainment of past and future mesne profits. The Lower Court passed an order in her favour. In appeal Mr. Rangachariar contends that the respondent is not entitled to claim any amount by way of mesne profits as *no decree* for profits, either past or future, has been passed in her favour and that if there is such a decree, it gives her only past and not future mesne profits. He also contends that the entire claim is barred by *res judicata* and that this petition is not maintainable.

Before I deal with these contentions and the respondent's reply to them, I shall dispose of one of the subsidiary contentions of the respondent which is a very simple one and which is based upon the construction of the High Court's decree. This contention is that the High Court's decree, which is the one sought to be executed, makes special provision with regard to future mesne profits. This contention is based on the observations made by the learned Judges regarding mesne profits so far as it relates to item 16 with reference to which the decree was slightly modified. These observations, even if they are made applicable to all the decreed items of property, as has been wrongly done by the amended decree, while as a matter of fact they refer only to item No. 16, do not in my opinion award any mesne profits to the decree-holder which have not been awarded by the original decree. The learned Judges do not decide the question whether the decree-holder is entitled to get future mesne profits, but they simply state: when the mesne profits are determined it will be a question for consideration whether the plaintiff would be entitled to future mesne profits. That leaves the matter exactly where it was according to the terms of the decree passed by the Subordinate Judge, and which they confirm by their judgment so far as it relates to the present question. In discussing the point whether the decree-holder is entitled to the past and future mesne profits claimed by her I shall therefore confine my attention to the terms of the original decree, as it has, with regard to mesne profits, not been amended by the decree passed by the High Court.

Now coming to the main argument, the appellant's first contention, as I have already observed, is that no decree has been passed by the Lower Court for profits, either past or future. His argument is twofold: firstly, that there are no words containing any *direction* or *order* in the decree awarding mesne profits, and secondly, that even if there be any such direction it is contained in a portion of the decree which the Court had no

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jurisdiction to pass and which must therefore be treated as of no effect whatever. The decree says:

> "It is further ordered that mesne profits be determined by a separate enquiry in execution proceedings."

If it was not the intention of the Court to award mesne profits by this direction, I cannot see the necessity for directing any enquiry as regards mesne profits at all. In my opinion it must be presumed from this provision that the Court intended to award mesne profits to the decree-holder. Though there are no express words awarding mesne profits to the decree-holder, to make the decree consistent with itself, we must hold that the Court intended to award mesne profits and that the decree-holder is entitled to claim them if there are no other objections in her way for doing so.

The next argument is that even if we read an implied direction awarding mesne profits in this portion of the decree, it cannot be given any effect as the Subordinate Judge has no jurisdiction to make a decree directing the determination of mesne profits in execution proceedings. This argument has been occasioned by the fact that the Subordinate Judge has, in making the provision for mesne profits, followed the procedure laid down in the old Code of Civil Procedure. Under the old Code, sections 211 and 212, mesne profits were assessed in the execution department; while under the terms of O. 20, R. 12 of the present Code mesne profits are assessed by an enquiry in the suit itself, and when they are determined a final decree will be passed in respect of them. Though the Subordinate Judge's order is not in conformity with the provisions of O. 20, R 12 of the present Code, it cannot be said that for that reason that portion of the decree directing an enquiry into the mesne profits is absolutely null and void. In support of this part of his argument Mr. Rangachari relies upon the following observation of Fletcher, J., in *Ganga Prasad Dutt* v. *Rani Hemangini Debi*[2]:

> "It was in excess of the powers of the Court to suggest that mesne profits would be ascertained in any manner other than that prescribed by the law The method in which mesne profits are ascertained under the present Civil Procedure Code is not by an enquiry in execution but by an application in the suit itself"

If by this observation it is meant that decretal orders passed by Judges, no doubt erroneously under the present Code, directing an enquiry into mesne profits in the execution department, are to be treated as absolutely null and void, I respectfully differ

2 (1917) 37 I.C. 997.

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from the opinion of the learned Judge. The present Code no doubt does not justify the order passed by the Lower Court, but it does not follow that the order is therefore necessarily void. In my opinion the order of the Subordinate Judge in this respect, though irregular, is not without jurisdiction and therefore can be given effect to. This view is supported by the recent decision in *Lakshmibai* v. *Ravji Bhikaji*.[1] In that case also the Subordinate Judge instead of passing an order under Order 20, Rule 12, ordered the mesne profits to be determined in execution. The learned Judges held that the decree though irregular was binding between the parties. They observe:

> "In the present case we do not think that there was any want of jurisdiction in the Court passing an order in contravention of O 20, R. 12, but that it was merely an erroneous or irregular exercise of jurisdiction."

In this view, which I am prepared to accept, I must hold that in the present case the Subordinate Judge has passed an executable decree as regards mesne profits in favour of the respondent.

The next question is whether this decree awards to the decree-holder only past mesne profits as contended for by Mr. Rangachariar or future mesne profits as well as contended for by Mr. Lakshmanna. The question is not quite free from difficulty, but after giving my best consideration to it I have come to the conclusion that the respondent's plea should be upheld. It is true that the plaintiff in her plaint did not ask for future mesne profits. In para. 3, as already pointed out, she asked for mesne profits for the years 1914 to 1919 and the valuation in the schedule specified this amount alone as one of the items for computing the Court-fee. Our attention has been specially drawn to these aspects of the claim to show that the order of the learned Judge should not be construed as giving a relief to the plaintiff which she did not ask for in her plaint. We are asked to say in view of the pleadings that the mesne profits with respect to which an enquiry has been ordered should be confined to the past mesne profits alone for which the demand was made in the plaint. This contention, however plausible, cannot be accepted in view of the decision of the Privy Council in *Fakharuddin Mahomed* v. *The Official Trustee of Bengal*,[4] which is the main case relied on by the respondent. In that case

> "the plaintiff was declared entitled to possession of the land mentioned in the kabinnama, with wasilat from the commencement of Srabun 1267; the wasilat to be ascertained by local enquiry."

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1 (1928) 31 Bom L.R. 400

4. (1881) L.R. 8 I A. 197 I.L.R. 8 C 178 (P.C.).

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Though no doubt the plaint was open to the construction that the plaintiff intended to claim future mesne profits as well, their Lordships of the Privy Council make it clear by their observations that they were prepared to uphold the order awarding future mesne profits exclusively on considerations of law which may be applied generally to all cases. Their Lordships after expressing the opinion that the plaint is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due, proceed to state as follows:—

"But *be that as it may* (the italics are mine) they are of opinion that under section 196 of Act VIII of 1859 it was in the power of the Court if it thought fit to make a decree which should give the plaintiff wasilat up to the date of obtaining possession"

Then after quoting section 196 of the Code of 1859, their Lordships state:

"Wasilat, by law, is demandable up to the time of possession; and the question is, whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is, that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession."

Their Lordships close the discussion by saying that this view was supported by two cases reported in *Dhurm Narain Singh* v. *Bundhoo Ram*[9] and *Bunsee Singh* v. *Mirza Nusuf Ali Beg*.[10] If we apply the test laid down in this judgment to the present case, I think it must be held that as the plaintiff is entitled under the present law also to claim mesne profits up to the time of possession, the more reasonable construction of the decree should be that the Court, in awarding her mesne profits, intended to award her such profits as are claimable up to the time of possession. It is contended that their Lordships of the Privy Council awarded future mesne profits because the plaint was open to that construction. But the expression, "Be that as it may" occurring in their Lordships' judgment expressed above, having regard to the context, clearly shows that the judgment is based upon the law that as mesne profits are

6 (1869) 12 W.R. 75.

10. (1874) 22 W R 328.

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claimable up to the time of delivery of possession the decree should be construed as giving the plaintiff future mesne profits though he has not asked for it. In this connection it may be noted that in one of the two cases referred to by their Lordships, namely, *Dhurm Narain Singh* v. *Bundhoo Ram*[6] the plaint, as will appear from the judgment, was not open to the construction that future mesne profits were claimed in it. In that case the decree was one for possession of land with wasilat (mesne profits). The decree-holder applied for possession and for wasilat from the period of dispossession down to the time of delivery of possession. The judgment-debtor complained that "the plaintiff was not entitled under the decree to anything more than wasilat down to the date of the institution of the suit *as stated in the plaint* (the italics are mine)—*see* the judgment of Jackson, J. This complaint was overruled and wasilat, having regard to section 196 of the Civil Procedure Code of 1859, was awarded up to the delivery of possession. Justice Jackson stated thus:

> "When the Court in its decree orders that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such mesne profits down to the date of delivery of possession"

In passing, I may note that having regard to the point under discussion the case before us is almost identical with the case in *Dhurm Narain Singh* v. *Bundhoo Ram*.[6] The decision of the Privy Council, as explained above, was followed in *Pramada Nath Roy* v. *The Secretary of State for India in Council*.[8] In that case the terms of the decree were:

> "The plaintiffs will be declared entitled to a five annas share of the disputed property and they do get possession of the same, the amount of mesne profits to be ascertained in execution;"

and though it was urged that the plaintiffs did not claim to recover future mesne profits in their plaint, the learned Judge held that they were entitled to future mesne profits also. It will appear from the judgment of Cumming, J., more fully reported in *Pramada Nath Roy* v. *The Secretary of State for India in Council*,[11] with which Page, J., concurred that "future mesne profits" were awarded on a construction of the decree on the principles indicated in *Fakharuddin Mahomed* v. *The Official Trustee of Bengal*[4] though in the course of the judgment reference is made to the fact that at the commencement of the plaint in the suit it was stated to be a suit for declaration of title and for recovery of

4. (1881) L.R. 8 I.A. 197: I.L.R. 8 C. 178 (P C)
6 (1869) 12 W.R. 75.
8 (1926) I.L.R. 53 C. 992.
11. (1926) 99 I.C. 428.

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possession of immoveable property and mesne profits. The contention that the decree-holder should not be given future mesne profits because in the plaint he has asked only for past mesne profits and has not included any claim for future mesne profits should not be allowed to prevail because mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds. As observed by Mookerjee, J., in *Bhupendra Kumar Chakravarty* v. *Purna Chandra Bose*[5] at page 655:

> "As regards the latter, there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued subsequent to the institution of the suit The mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit, and although, therefore, the amount may not be stated with absolute certainty, the amount can be mentioned with some approach to approximation"

From this it will follow that the plaintiff should not be punished for not including in his plaint a cause of action which had not arisen at the time of the suit and so it is wisely provided by statutory provision "with the obvious purpose of shortening litigation" that the future mesne profits may be awarded in the suit though they were not asked for in the plaint. A decree, though framed generally for mesne profits, should therefore be reasonably construed as awarding future mesne profits as well if there is nothing in the decree standing in the way of such a construction. The decree-holder should therefore be given future mesne profits, as mesne profits are demandable up to the time of execution unless as I have already pointed out the decree clearly indicates that future mesne profits have not been awarded to the decree-holder. Mr. Rangachariar contends that the use of the definite article "the" before "mesne profits" appearing in that part of the decree directing enquiry into mesne profits shows clearly that the enquiry is to be as regards the mesne profits that were asked for, that is, "the past mesne profits," and nothing more. This argument is objectionable as it lays an unnecessary emphasis on the word "the" and runs counter to the principle of construction that I have said should be adopted. It is further contended that the Privy Council decision should not be applied to this case because under Order 20, Rule 12 of the present Code, future mesne profits are not claimable in law in a suit for "past mesne profits." It is conceded that in a suit for "past mesne profits" under sections 211 and 212 of the old Code, future mesne pro-

5 (1910) I.L.R. 43 C 650 at 655.

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fits may be awarded. The provisions in the old Code relating to mesne profits have been recast and they are now contained in Order 20, Rule 12, and section 2, clause (12). The words "mesne profits" in Order 20, Rule 12 will include past profits. The language used in the rule does not endorse the view suggested by the appellant and no authority has been cited by the learned Advocate in support of his proposition. I must, therefore, hold on the authority of the Privy Council decision in *Fakharuddin Mahomed* v. *The Official Trustee of Bengal*[4] that the Lower Court was right in allowing execution of the decree for future mesne profits as well. This conclusion is not opposed to the decision in *Sadasiva Pillai* v. *Ramalinga Pillai*[7] for the decree in that case (*see* page 226, para. 1) was "silent as to the mesne profits which has accrued since the institution of the suit," whereas in the present case the decree refers to mesne profits generally.

The next argument advanced for the appellant is that the present application is barred by *res judicata* on account of the order passed in E.A. No. 1120 of 1926. That was an application filed by the decree-holder for the determination of mesne and subsequent profits in respect of the suit properties from the defendants and to pass a decree accordingly. The application was dismissed by the following order:

"As admitted by the decree-holder's vakil, an E.P. is necessary and the petition is not maintainable The petition is rejected with costs."

It is argued that the present application asking for the same relief is therefore barred by this order. There was a good deal of discussion at the Bar as regards the distinction between an E.P. (execution petition) and an E.A. (execution application)—*see* Rr. 3 and 149 of the Civil Rules of Practice for the distinction—and what was really meant by the admission of the decree-holder's vakil in the prior petition that "an E.P." is necessary and the petition is not maintainable. In the view that I take of the appellant's argument it is not necessary to discuss this question as I think the plea of *res judicata* should not be allowed to prevail inasmuch as the prior application was not disposed of by the Court on the merits (see *Ramachandra Raju* v. *Sri Raja Bhujanga Rao*[3]) as is obvious from the order itself.

One more argument advanced on behalf of the appellants remains to be noticed and that is, that the present application headed "Execution Petition," that is, an E.P. should not have

3 (1923) 46 M L.J 46
4 (1881) L.R. 8 I A. 197: I L.R 8 C. 178 (P C).
7 (1875) L.R. 2 I.A. 219.

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been accepted by the Court, as Courts have no jurisdiction to entertain what are termed "execution applications" for ascertainment of mesne profits under Order 20, Rule 12 (see *Ramachandra Raju* v. *Sri Raja Bhujanga Rao*[3]). I must say that the argument comes with very bad grace from the appellant for it was on the objection raised by him that the decree-holder consented to file the "execution petition" (*see* the order in E.A. No. 1120 of 1926 quoted above). However that may be, the present petition though headed "execution petition" is obviously, having regard to its contents, an application in the suit itself for the determination of past and future profits as required under Order 20, Rule 12 of the Code of Civil Procedure. As regards the form of the application, therefore, there can be no objection. No other bar to the entertainment of the application has been pleaded in connection with this argument. I think the Lower Court was right in treating the application as an application in the suit for the ascertainment of mesne profits.

Mr. Lakshmanna on behalf of the decree-holder relied on the conduct of the parties as shown by certain proceedings in Court and also on the order passed by the High Court for stay of the execution of the Lower Court's decree pending the appeal and the papers connected therewith to show in what manner the decree, so far as the question of mesne profits was concerned, was interpreted by the parties. I do not think that these considerations are really relevant for the disposal of this appeal.

In the result I agree that the appeal should be dismissed with costs.

The Memorandum of Objections is also dismissed but without costs.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—H. O. C. BEASLEY, *Chief Justice* AND MR. JUSTICE CORNISH.

Sami Karuppa Thevan .. *Appellant* (2nd Accused-2nd Prisoner).*

Sami Karuppa Thevan, *In re.*

Criminal Tribes Act (VI of 1924), S 23 (1)—"Special reason to the contrary"—Interval of time between the date of the discharge of the accused from prison and the commission of fresh offence by him—Interval of seven or eight years—Whether a ground for awarding less sentence than transportation for life

The fact that the accused has not been convicted for some years after he served his last sentence may be a "special reason to the contrary" within the meaning of section 23 (1) of the Criminal Tribes Act

*Cr Appeal No 107 of 1929 — 1st August, 1929.

3. (1923) 46 M.L J. 46 at 48.

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Where the accused had been sentenced in February, 1911, to five years' rigorous imprisonment for having committed the offence of dacoity and subsequently in March, 1911, to seven years' rigorous imprisonment at a separate trial for having committed the offence of dacoity with attempt to cause grievous hurt, but earned a remission of sentence and was discharged from prison in 1920, and was not convicted of any offence for seven or eight years afterwards,

Held, that the fact of his not having been convicted of any offence for seven or eight years after he served his last sentence was a special reason for awarding him a less sentence than that of transportation for life under section 23 (1) of the Criminal Tribes Act.

In re Mayandi Thevan, (1926) I.L.R. 50 M 474 51 M.L.J. 495 referred to.

Appeal against the order of the Court of Session of the Madura Division in Case No. 110 of the Calendar for 1928.

The Public Prosecutor on behalf of the Crown.

Accused was unrepresented.

The judgment of the Court was delivered by

Beasley, C.J.

Beasley, C.J.—There were three accused in Sessions Case No. 110 of 1928 in the Sessions Court at Madura and they were charged with house-breaking by night and theft in a building punishable under sections 457 and 380, Indian Penal Code. The 2nd accused was charged in addition with liability to enhanced punishment under S. 75, Indian Penal Code and S. 23 (1) (*b*) of Act VI of 1924. The case was tried by the Sessions Judge sitting with a jury and they unanimously found the first accused not guilty of any offence and the 2nd and 3rd accused guilty under sections 457 and 380, Indian Penal Code.

The 1st accused was acquitted, the 3rd accused was sentenced to six months' rigorous imprisonment as the offence was not a very serious one, having regard to the value of the stolen property. The 2nd accused, the appellant here, was sentenced to transportation for life; that was, in the view of the learned Sessions Judge, the only sentence which could be passed upon him because he had been previously convicted on two occasions and the section says that, where the accused is found guilty of a certain offence specified in the Act and he has had two previous convictions, he is to be sentenced to transportation for life, unless there are special reasons to the contrary. The learned Sessions Judge was not able to find any special reasons to the contrary. The question as to what are such special reasons as would entitle the Court to award a less sentence than that specified by the section, namely, transportation for life, has been considered by a Bench of this Court in *In re Mayandi Thevan*.[1] In that case the offence of which

1. (1926) I.L.R. 50 M. 474. 51 M.L.J. 495.

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the accused was charged was not one of a serious nature and the Trial Judge sentenced him to eighteen months' rigorous imprisonment. He had, however, overlooked the fact that he was a member of a criminal tribe and the case came up before that Bench for enhancement of the sentence.

The Bench found themselves in a position of difficulty because they were unable to do anything else but enhance the sentence to one of transportation for life as there had been two previous convictions against the accused; and, in considering what the words "special reasons to the contrary" which occur in that section mean, they held that the mere fact that the offence is not of a serious nature cannot form a special reason to the contrary in reducing the sentence and such a special reason must be something apart from the nature of the offence such as youth, age, illness or sex. It cannot be supposed that the Bench, in stating what the special reasons are, intended to deal exhaustively with them. There may be other reasons and we think that one special reason would be the interval of time which has elapsed between the accused person coming out of prison after serving his last sentence and the commission of the offence. Circumstances such as those are always taken into consideration by English Courts in awarding sentences; and where the accused has not been convicted for some years, that fact has usually been taken into consideration in passing upon him a less sentence than would ordinarily be passed upon a previously convicted person.

In this case, the previous convictions were (1) for the offence of dacoity, and (2) for dacoity with attempt to cause grievous hurt which of course is a far more serious offence. In respect of the first offence he was sentenced to five years' rigorous imprisonment in February, 1911, and in respect of the second offence he was sentenced to seven years' rigorous imprisonment in March, 1911. Presumably these were convictions at separate trials and we must assume that the sentences must have been served consecutively. Therefore in March, 1911, the accused had to serve sentences amounting to twelve years' rigorous imprisonment. That would take him to 1923 but he would earn a considerable remission of sentence and presumably would have been discharged from prison in about 1920. He would therefore have been seven or eight years without being convicted of any offence and we feel that this is a matter which we ought to consider favourably in construing the section and should hold that it is

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a special reason for awarding him a less sentence than that specified in the section, namely, transportation for life. Upholding the conviction, we reduce the sentence to one of seven years' rigorous imprisonment.

N.S. *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Lakshumi Achi and another .. *Appellants** (*Plffs.*)

v.

Narayanaswami Naicker and others .. *Respondents* (*Defts.*).

Lakshumi Achi *v.* Narayanaswami Naicker.

Hindu Law—Joint family consisting of two brothers—Mortgage by one—Subsequent agreement by him to sell his share of the family properties to his brother—Suit for specific performance—Compromise decree—Allotment of some properties to mortgagor's wife and sale of the rest to his brother—Undertaking by vendee to discharge vendor's debts as consideration for the sale—Effect of the sale—If effects a division between the brothers—Right of creditors of vendor to take advantage of the covenant in the sale-deed directing the vendee to discharge the vendor's debts—Transferee from vendee discharging some of the debts of the vendor mentioned in the sale-deed—If entitled to priority over the other debts mentioned in the sale-deed—Transferees from such transferee, if entitled to such priority

A mortgage was executed by *A*, one of two brothers *A* and *B* who formed a joint Hindu family Some time afterwards, the other brother *B* filed a suit for specific performance of an agreement to sell *A's* share of the family properties In this suit, a compromise decree was passed by which two of the items of properties comprised in the suit were settled upon *A's* wife for life and all the other items were to be sold to *B*. In execution of this decree, a sale-deed was obtained by *B* through the Court. The consideration for this sale-deed was to be paid by *B* undertaking to discharge various debts of *A* one of which was this mortgage debt, and the sale-deed showed that some debts were taken as binding on both the brothers and others on *A* alone. *B* died afterwards without discharging this mortgage debt. It was found that the mortgage was not binding on the family properties as one executed by the managing member for binding purposes.

Held (1) that *A* and *B* should be considered to have become divided after the sale-deed and consequently *A* did not get the properties of *B* by survivorship on his death, and (2) that the only effect of the covenant in the sale-deed that *B* should discharge *A's* debts was to make *B* liable as between himself and the vendor *A* to pay off all the debts of *A* out of all the properties which were the subject of the sale, *i e*, *A's* share of the properties, and personally out of the properties of his own, but that such a covenant could not be taken advantage of by the creditors of *A* who were no parties to the sale-deed and whose remedies must be confined to their rights under their documents.

Where a mortgagor sells his property requiring the vendee to pay off two or three prior debts of the mortgagor and the vendee pays off only one of them, he cannot claim priority in respect of it over the others, though he may claim such priority in respect of some other debts the

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*Appeal No. 89 of 1924. 2nd August, 1929.

payment of which by him was not contemplated. This disability of the vendee applies also to transferees from him.

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Har Shyam Chowdhuri v. *Shyam Lal Sahu*, (1915) I.L.R. 43 Cal. 69 and *Busseswar Prasad* v. *Lala Sarnam Singh*, (1907) 6 C.L.J. 134 referred to.

Quaere: Whether this disability of the vendee applies also to subsequent transferees from such transferee of the vendee?

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in O.S. No. 16 of 1922.

S. Varadachariar and *C. A. Seshagiri Sastriar* for appellants.

L. A. Govindaraghava Aiyar, K. Rajah Aiyar, V. Ramaswami Aiyar and *P. N. Appuswami Aiyar* for respondents.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—The suit out of which this appeal arises was filed on the basis of a mortgage bond, dated the 5th March, 1914, executed by the 1st defendant in favour of one Subramaniam Chettiar, who was the son of the 1st plaintiff and the husband of the 2nd plaintiff. At the time of the mortgage the 1st defendant had a brother Natarajulu and they were undivided. The plaintiffs claim that the 1st defendant Narayanaswami was the manager of the family and the mortgage deed was executed for purposes binding on the family. The defendants denied these allegations and contended that the debt is not binding on Natarajulu's share. This point was found by the Subordinate Judge against the plaintiffs and the plaintiffs who are the appellants before us do not attack this finding so far as the state of things existing at the date of the mortgage is concerned. A few months after the execution of Ex. A, a suit was filed by Natarajulu for specific performance of an agreement to sell Narayanaswami's share of the family properties with certain other reliefs which it is unnecessary to mention. Ex. C (1), dated the 2nd November, 1914, is the plaint and Ex. C is the compromise decree passed in that suit, dated the 23rd November, 1915. According to the said compromise decree, two of the items included in that suit were settled upon the 1st defendant's wife for life and all the other properties were to be sold to Natarajulu. In execution of this decree, a sale-deed was obtained by Natarajulu through the Court. This is Ex. C (2), dated the 30th November, 1916. The consideration for the sale-deed was Rs. 35,000 and the consideration was to be paid by the vendee undertaking to discharge various debts of the vendor. Sixteen debts were enumerated in the sale-deed. It is necessary to make particular mention of some of

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these items. The first item is Narayanaswami's half share of the debt due on a mortgage bond, dated the 11th August, 1909 executed by both the brothers (Ex. V). The fourth item is a sum of Rs. 356-4-0 due wholly by Narayanaswami on a mortgage bond, dated the 10th March, 1913 (Ex. XVI). The fifth item is a sum of Rs. 821-4-0 due wholly by Narayanaswami on a mortgage bond executed by him on the 18th November, 1913 (Ex. XVI-*a*). The sixth item is a sum of Rs. 1,100 due wholly by Narayanaswami on a mortgage bond executed by him on 1st November, 1913 (Ex. XIV). The tenth item is a sum of Rs. 2,675 due wholly by Narayanaswami in respect of Ex. A. It is unnecessary to refer to the other items. The plaintiffs now claim that Natarajulu's share of the properties also is liable to their debt first on the ground that after the death of Natarajulu in 1919, these properties survived to Narayanaswami and the mortgage, Ex. A, is at least now binding on the whole of the properties and secondly on the ground that Natarajulu having undertaken to pay off Narayanaswami's debts by the sale-deed, Ex. C (2), it has become a personal obligation and he is liable to pay off the debts due to the plaintiffs out of the properties of the family and not merely Narayanaswami's properties. This is the first point argued in appeal, the point having been decided by the Subordinate Judge against the plaintiffs. The second point argued by the appellants is that certain alienees from Natarajulu or his mother, the 2nd defendant, are not entitled to priority over the plaintiffs' mortgage on account of their having paid off certain mortgages of the 1st defendant earlier in date than the plaintiffs' mortgage. The last point argued in appeal relates to the rate of interest. The 2nd defendant, the mother of the two brothers, claims to be interested in Natarajulu's half share of the properties not sold to the alienees.

Taking up the first point, one subordinate question that arises is whether after the sale-deed, Ex. C(2), the two brothers should be considered as divided or still undivided. Mr. Varadachariar, the learned Advocate for the appellants, relied on certain observations of Bhashyam Aiyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*.[1] The alienation in that case was by a member of a joint family in favour of a stranger and the point referred to the Full Bench was what fraction of the family property passed to the alienee by the sale-deed. The observation relied on is at page 717. I do not think this observation helps the appellants. If a member of an undivided

1. (1902) I.L.R. 25 M. 690 (F.B)

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family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at page 717 amounts to. It almost implies that so far as the properties in which the whole or part of the member's share is sold are concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the family the matter becomes much stronger. The observations at page 268 of *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[2] do not go beyond what I have stated above and even if there are any observations in those two cases in favour of the appellants their value must be discounted on the ground that these observations were made long before the decision of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj.*[3] In the present case, a careful examination of the terms of the compromise and the provisions therein that certain items should go to the heirs of Narayanaswami and the terms of the sale-deed, Ex. C (2), showing that some debts were taken as binding on both the brothers and others on Narayanaswami alone—all show the unmistakable intention that the brothers should thereafter be separate. So early as *Balkrishna Trimbak Tendulkar* v. *Savitribai*[4] such a conclusion was reached. We are of opinion that the finding of the Subordinate Judge on the second issue is unsustainable. On the facts of this case the presumption of jointness is overwhelmingly rebutted. Therefore there is no survivorship of the properties of Natarajulu to the 1st defendant.

It is next suggested that the effect of Ex. C (2) is to make Natarajulu liable to pay the plaintiffs' debt out of the whole of the properties. In the first place the sale-deed is only of Narayanaswami's share of the properties. They are transferred to Natarajulu in consideration of his paying off Narayanaswami's debts. The only effect of the covenant in the sale-deed is that Natarajulu is liable *as between himself and the vendor* to pay off all the debts of the vendor out of all the properties which were the subject of the sale, that is, Narayanaswami's share of the properties, and personally out of the other properties of his own but such a covenant cannot be taken advantage of by the cre-

2. (1914) I.L R 39 M 265· 27 M.L.J. 409.
3 (1916) L.R 43 I.A 151: I L.R. 43 C 1031: 31 M.L.J. 455 (P.C).
4. (1878) I.L.R. 3 B 54.

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ditors who are no parties to the sale-deed and so far as creditors like the plaintiffs are concerned their remedies are confined to the rights under their documents. The plaintiffs' rights are to sell the mortgaged properties under Ex. A. It may be that if, by non-payment of plaintiffs' debt by Natarajulu, Narayanaswami was put to trouble of some kind, he can sue Natarajulu for damages by reason of the breach of the covenant, but apart from this we cannot see how creditors like the plaintiffs can take advantage of the covenant. Nor can we read anything in the terms of the sale-deed to show an undertaking by Natarajulu that he will pay off all the vendor's debts out of the whole of the family properties. On the other hand, portions of the sale-deed imply that some of the debts are not binding on Natarajulu at all and he is in no way liable for them and, in the case of other debts, he is liable only to the extent of his half share. It is impossible to spell out of these terms an undertaking of Natarajulu in respect of his own share of the properties for Narayanaswami's share of the debts enuring to the benefit of creditors. The analogy of universal donee is invoked by the learned Advocate for the appellants but we are not able to say that this analogy helps him We are therefore of opinion that the plaintiffs can recover their debts only out of the half share of Narayanaswami in the mortgaged properties.

The next question that arises is whether certain of the alienees are entitled to priority over the plaintiffs' mortgage. The following table shows the parties claiming such priority over the plaintiffs, the items in the plaintiffs' mortgage in respect of which the priority is claimed, the debts by reason of the payment of which such priority is claimed and the last column shows the amount to the extent to which the priority is claimed:—

1	2	3	4
Persons claiming priority.	Items in respect of which priority is claimed.	Prior debts paid.	Amount to the extent to which priority is claimed.
4th Defendant	Nos. 1 and 2.	Ex V.	Rs. 4,500.
5th and 6th Defts.	No. 15.	Exs XVI and XVI (a).	Rs. 3,900.
15th Defendant.	Nos. 8 and 14	Ex XIV.	Rs. 5 500.

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Mr. Varadachariar, the learned Advocate for the appellants, argued first that as Ex. C (2) provides for the payment of Narayanaswami's debts by Natarajulu, he can himself claim no priority if he pays some of these debts and does not pay others, and that being so, persons claiming through him can claim no such priority; and secondly, that in the sale-deeds of Natarajulu in favour of the various alienees, they were asked to pay the prior mortgages and therefore they cannot claim any priority. Now it is clear that where a mortgagor sells his property to a vendee requiring the vendee to pay off two or three prior debts of the mortgagor and if the vendee pays off only one of them, he cannot claim priority in respect of it over the others though he may claim such priority in respect of some other debts the payment of which by him was not contemplated. This proposition was decided in *Govindasami Tevan* v. *Dorasami Pillai*[5] and both branches of the above statement are illustrated by the decision in *Har Shyam Chowdhuri* v. *Shyam Lal Sahu*.[6] In the latter case it was held that the vendee could claim priority in respect of the debt *X* and not in respect of the debts *Y* or *Z*. This proposition is conceded by the respondents. The question, however, arises how far this disability of the vendee applies to transferees from him. In *Bisseswar Prosad* v. *Lala Sarnam Singh*[7] it was held that the transferees also cannot claim such priority—*vide* the observations at page 139 of *Bisseswar Prosad* v. *Lala Sarnam Singh*[7] beginning with

"In our opinion, they do not, because they had constructive, if not, actual notice of the debt due to Muniram and of the circumstances that Prayag Lall had assumed payment of it. [*Rajaram* v *Krishnasami*,[8] *Hamilton* v *Royse*,[9] *Roddy* v *Williams*,[10] Wade on Notice, Ss 311-315.] The conveyance of these defendants under which they purchased the property from Prayag Lall on the 27th September, 1894, shows that their vendor had acquired title by purchase. If they had investigated his title and examined his conveyance, as they ought to have done, they would have found therein a statement that money was due to Muniram and that their vendor Joyram assumed payment of that debt It further appears from the deposition of defendant 21, Raghunandan, that at the time of the purchase, he examined the title-deed of Prayag Lall If, therefore, these defendants had made any enquiry, they would have at once discovered, that Muniram or his representative was still entitled to enforce his security, and that Prayag Lall, who had assumed payment of the mortgage-debt, had failed to carry out his undertaking Under these circumstances, it is impossible to hold that defendants 21 to 24 can claim to stand in a better position than Prayag Lall himself They are, consequently, not entitled to be

5 (1910) I.L.R. 34 M 119: 20 M.L.J. 380.
6 (1915) I.L.R. 43 C. 69.
7 (1907) 6 C.L.J. 134.
8 (1892) I.L.R. 16 M. 301
9 (1804) 2 Sch. & Lef. 315.
10. (1845) 3 Jones & LaTouche 1.

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subrogated to the rights of the mortgagee of the 28th May, 1889, whose debt they satisfied.''

In the present case a perusal of Ex. C (2) shows the position undertaken by Natarajulu, and all his vendees must be taken to have actual or constructive notice of Ex. C (2), that is, the title-deed of their vendor, and they cannot pretend ignorance of its contents. No case has been cited to support the contention of the respondents that the transferees stand in a better position than the transferor. There is no analogy between the relative positions of such transferor and transferee and the relative position of the mortgagor and his first transferee who would be transferor as against a second transferee. The relative rights between the two sets of parties are entirely different. The effect of the sale-deed Ex. C (2) is to calculate all the debts of Narayanaswami up to a particular date and to make them stand on the same footing as on that date. The description of the various items of consideration show that all the debts were calculated up to the 5th October, 1914 and the total amount of consideration, Rs. 35,000, was made up as on that date, and neither in the hands of Natarajulu nor in the hands of transferees from him can there be any priority between these various debts whatever their original dates might have been. It is unnecessary to deal with the larger contention of Mr. Varadachari that wherever there is a covenant by the vendee to pay off a prior debt of the mortgagor there can be no priority in respect of it. The authorities relied on by Mr. Rajah Aiyar, for example, *Satnarain Tewari* v. *Chowdhuri Sheobaran Singh*[11] and *Chidambara Nadan* v. *Muni Nagendrayyan*,[12] show that no such broad proposition can be insisted on and it is safer to rest the decision in each particular case on the particular intention in that case derived from the facts and not upon any general formula of that kind. But so far as transferees from the first transferee are concerned there can be no question of their intention, for they stand in no better position than their transferor and it is unnecessary to examine their intention. After all, the rights conferred upon the transferees who pay off prior mortgages for using such prior mortgages as a shield are the result of an equitable doctrine in spite of the fact that the mortgages are extinguished, and where a transferor by reason of his covenants and the transferee by reason of a notice of the transferor's covenants show a different intention, there is no scope for the application of such an equitable doctrine. The decisions in

11. (1911) 14 C.L.J. 500.

12 (1920) 39 M.L J. 445

Kasim Moideen Rowther v. *Annamalai Thevan*[13] and in *Thorne* v. *Cann*[14] do not help the respondents. I therefore hold that the respondents mentioned in the above table cannot claim priority over the plaintiffs' debts in respect of the half share of Narayanaswami's debt under Ex. V and the other debts of Narayanaswami and the other bonds mentioned in the table.

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The other point which arises in the case is the question of interest. There is no dispute about this. The plaintiffs are entitled to the contract rate up to the date mentioned in the decree for payment, namely, the 10th April, 1924. The Subordinate Judge allowed it up to the date of the decree and thereafter at 3 per cent. per annum. The appellants will be allowed interest at the contract rate up to 10th April, 1924 and on the consolidated amount from that date at 6 per cent. per annum up to the date of payment.

The decree will be modified according to the second and third of the above findings.

The appellants will pay the costs of the 2nd defendant, Govindammal. The appellants will be entitled to proportionate costs on the amounts in respect of which there is a dispute as to priority from the 5th and 6th (in whose place the 4th defendant has stepped in pending appeal) and from the 15th defendant respectively but as to 4th defendant and Ex. V the appellants will be entitled to half the costs.

Jackson, J.—I agree.

Jackson, J.

The question of the alienees' priority appears to me to be simply one of fact. They knew that their vendor had undertaken to pay off the mortgages, and they knew that their own sales were effected in pursuance of that undertaking. There is no ground for presuming that with that knowledge they ever intended to keep alive the mortgages which they paid up; and I should find, as a matter of fact, that the idea never crossed their minds. No doubt as observed in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das*,[15] it may ordinarily be presumed that a man having a right to act in either of two ways has acted according to his interest. But that presumption of fact is rebuttable as shown in *Govindasami Tevan* v. *Dorasami Pillai*.[5] If the party who pays off the mortgage suffers by the presumption not being in his favour, he has only himself to thank for not committing his intention to

5. (1910) I.L.R. 34 M 119· 20 M L.J. 380.
13 (1909) 3 I.C. 936.
14 (1895) A.C. 11
15. (1884) L.R. 11 I.A. 126· I.L.R. 10 C 1035 (P.C.).

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paper. Although the intention to keep a mortgage alive need not be formally expressed in India, nevertheless such formal expression by way of deed would save parties considerable confusion, litigation and expense.

N.S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Subbayya Pillai .. *Petitioner** (*Complainant*)

v.

V. Sesha Aiyar and others .. *Respondents* (*Accused*).

Subbayya Pillai v. Sesha Aiyar.

Criminal Procedure Code (V of 1898), S. 239—Complaint against five persons, charging four of them with an offence and the other with abetment of that offence—Order framing charge against the offenders but discharging the abettor as not being identified—Application by complainant to revise the order of discharge—Granting of the application—Cross-examination of one prosecution witness by the other accused meanwhile—Proper procedure to be adopted—Joint trial or separate trial.

A complaint was filed against five persons charging the accused 2 to 5 with an offence and the 1st accused with the abetment of that offence. The Magistrate who tried the case discharged the 1st accused on the ground that he had not been identified and framed a charge against the remaining accused. The complainant then applied to the Sessions Judge to revise the order discharging the 1st accused and the application was granted. Meanwhile, one prosecution witness had been further cross-examined by accused 2 to 5 after the charge.

Held, that though ordinarily the correct procedure was to try the abettor with the primary offenders, in the present case the proper procedure to be adopted was to try the 1st accused separately and not jointly with accused 2 to 5.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Town Sub-Magistrate of Trichinopoly, dated 1st February, 1929 and made in C.C. No. 236 of 1927.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for petitioner.

T. R. Venkatarama Sastriar for *K. S. Sankara Aiyar* and *M. S. Vaidyanatha Aiyar* for respondents.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner is the complainant. He filed a complaint against five persons which was taken on file against accused 2 to 5 as voluntarily causing grievous hurt under section 325,

*Cr R.C. No 140 of 1929 (Cr.R.P. No. 120 of 1929.) 21st August, 1929.

Subbayya Pillai v. Sesha Aiyar

Indian Penal Code, and against 1st accused, who is a pleader, as abettor of that offence, under sections 325 and 114, Indian Penal Code. The Town Sub-Magistrate of Trichinopoly who tried the case discharged the 1st accused on the ground that he had not been identified, and framed a charge against the remaining accused of the offence stated. The complainant then applied to the Sessions Judge of Trichinopoly to revise the order discharging the 1st accused and the application was granted, the learned Sessions Judge directing further inquiry which was to include affording several of the prosecution witnesses an opportunity of identifying the 1st accused. In Criminal Revision Case No. 952 of 1928, Reilly, J., refused to interfere with this order.

Meanwhile, as I have said, a charge had been framed against the other accused and the first prosecution witness had been further cross-examined after charge. The question then arises as to the correct procedure to be adopted,—whether, as the petitioner urges, the joint trial of all the accused could be resumed or whether the trial of the 1st accused must be conducted separately. The parties appear to have been canvassing this question before the local Courts, for I find an application by the 1st accused disposed of by the Sub-divisional Magistrate on 5th January, 1929, in which it is said that there can be no question of a joint trial, and another application by the complainant to the Sub-Magistrate insisting that a joint trial is necessitated by the circumstances. The Sub-Magistrate is, however, of a contrary opinion. I think that the views taken by these Courts are correct.

No one disputes the general principle, to which Spencer, O.C.J., gave expression in *Sogaimuthu Padayachi* v. *King-Emperor*,[1] that ordinarily the correct course is to try an abettor with the primary offender or offenders. Where no reason to the contrary appears, the enabling provisions of S. 239 of the Criminal Procedure Code should be availed of. In the present case, however, it is, I think, only necessary to consider what a joint trial would involve to be satisfied that it cannot now be had compatibly with observing the rules of procedure.

Suppose, then, that the 1st accused is reinstated in the dock along with the remaining accused. The proceedings against those accused, as I have said, have extended to the framing of a charge and to the further cross-examination of a witness after charge. One of two courses must then be pursued. Either

1. (1925) I.L.R. 50 M. 274.

Subbayya Pillai v. Sesha Aiyar.

that part of the proceedings against accused 2 to 5 which took place after the order discharging 1st accused was passed must be expunged so as to restore them to that point in the inquiry which has been reached in the case of the 1st accused, or inquiry must be conducted solely into the 1st accused's case until it reaches the stage at which it stands against the other accused. For adopting the former alternative I can find no justification. It is not to be found in the order directing further inquiry against the 1st accused. Cancellation of the charge could only be justified on the ground that it had been improperly framed, and no such ground can be alleged. We are left then with the second alternative, and that presents even greater difficulties. Assuming that the inquiry is taken up against the 1st accused at the point where it was dropped, the next step would be the examination of P.Ws. 6 to 9 touching their identification of the 1st accused, and their cross-examination upon this question. Their statements would be evidence against the 1st accused, but although what they said might bear upon the case against the others, it would not be evidence against them. The Court would have to distinguish in its mind between what was admissible against one of the accused and what was admissible against the others. It need scarcely be said that such a position would be at variance with the principles upon which a joint trial should be conducted. It would in effect be no joint trial at all, because while the inquiry preceding charge was being conducted against the 1st accused, proceedings against the remainder would be at a standstill.

I conclude then that the Sub-Magistrate is taking the only practicable course in deciding to try the 1st accused separately. Since the statements of the prosecution witnesses already recorded must be appropriated to one or other of the enquiries, and cannot, as to any part of them, be made to serve for both, this will involve a *de novo* inquiry into the case against the 1st accused. The Criminal Revision Petition is dismissed.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CORNISH.

Thangammal Ayiyar .. *Petitioner** (*Deft.*)

v.

Krishnan (minor) and another .. *Respondents* (*Plffs.*).

Thangammal Ayiyar v. Krishnan.

Legal Practitioners Act (*XVIII of* 1879), *S* 28—*Agreement between*

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*C.R.P. No. 1357 of 1927. 4th October, 1929.

pleader and client opposed to the section—Effect—Right of pleader for remuneration—Indian Contract Act, S. 65.

Even though an agreement entered into by a pleader with his client respecting the payment of his remuneration is opposed to the provisions of S. 28 of the Legal Practitioners Act and as such void, the pleader is still entitled to recover remuneration from his client for the services rendered by him either in full as under the agreement or a reasonable portion thereof under section 65 of the Indian Contract Act by way of compensation for the advantage which the client received under the agreement.

Subba Pillai v. *Ramasami Aiyar,* (1903) I.L.R. 27 M 512 14 M.L.J. 274 explained and commented upon

Petition under section 25 of Act IX of 1887 praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge of Tanjore in Small Cause Suit No. 293 of 1926.

B. Venkataraman for petitioner.

S. Rangachariar for respondents.

The Court delivered the following

JUDGMENTS. *Madhavan Nair, J.*—The defendant is the petitioner. This Civil Revision Petition arises out of a suit instituted by the 1st plaintiff for the recovery of Rs. 500 as vakil's fees due to him in respect of his appearance as pleader on behalf of the defendant's deceased husband, the Zamindar of Nagaram, in Summary Suit No. 559 of 1923 on the file of the Revenue Divisional Officer, Pattukotta. The 1st plaintiff died subsequent to the filing of the suit and his undivided sons were added as his legal representatives, plaintiffs 2 and 3. The case of the plaintiffs is that the 1st plaintiff, the deceased vakil Appasami Aiyar, appeared in the above suit for 28 hearings and the late Zamindar of Nagaram agreed to pay him at a certain rate *per diem,* and that, even if the Court thinks that the agreement is not valid, the sum claimed should be paid on the basis of *quantum meruit* The defendant pleaded that the contract set up by the plaintiffs is not true or valid, and that, even if the 1st plaintiff is entitled to any remuneration, the sum claimed was excessive. The two main issues in the case were: (1) whether there was a specific contract as alleged in the plaint, and (2) whether the plaintiffs can claim compensation on the principle of *quantum meruit.* On these issues the learned Subordinate Judge found in favour of the plaintiffs and gave them a decree for a sum of Rs. 390 according to the rate mentioned in the agreement.

Madhavan Nair, J

In this Civil Revision Petition the only point urged before us is that, having regard to section 28 of the Legal Practitioners

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Madhavan Nair, J.

Act, the agreement entered into between the petitioner's husband and the 1st plaintiff is not valid and binding and therefore the 1st plaintiff is not entitled to recover any sum as remuneration for his services. This argument is admittedly opposed to the decision in *Subba Pillai* v *Ramasami Aiyar*,[1] which will be referred to presently. As the learned Chief Justice before whom the case came up for disposal doubted the correctness of that decision he has referred it to a Bench with the following note:

"This case must be referred to a Bench Sitting as a single Judge here I have no power to refuse to follow *Subba Pillai* v *Ramasami Aiyar*,[1] although I take the liberty of saying that I think that it amounts to an absolute departure from the plain words of the section of the Statute But that must be said, if it is to be said with effect, by a Bench and not by a single Judge"

Section 28 of the Legal Practitioners Act is in these terms:

"No agreement entered into by any pleader with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements, in respect of business done or to be done by such pleader shall be valid, unless it is made in writing signed by such person, and is, within fifteen days from the day on which it is executed filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done"

It is argued that the contract in this case, being an oral one, contravenes the provisions of this section and is void and so the decree of the Lower Court should be set aside. In support of this argument reliance is placed on the decisions in *Kumar Kamakshya Narayan Singh* v. *Kalyan Singh*[2] and *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy*,[3] both of which support the petitioner's contention; but the trend of the decisions of this Court is to the effect that, even if the agreement is opposed to the provisions of S. 28 of the Legal Practitioners Act and is invalid the pleader is still entitled to recover remuneration for his services, either in full as under the agreement or a reasonable portion thereof. The leading decision on the question is the one in *Subba Pillai* v *Ramasami Aiyar*,[1] which refers to *Rama* v. *Kunji*[4] and *Krishnaswami* v. *Kesava*,[5] two earlier decisions of this Court. In *Rama* v. *Kunji*[4] remuneration for services was decreed to a pleader in the absence of an agreement under S. 70 of the Indian Contract Act. In *Krishnaswami* v. *Kesava*[5] the plaintiff based his claim for fee on a promissory note which was not filed in Court in that suit

1 (1903) I L.R. 27 M. 512. 14 M.L.J. 274

2 (1927) I.L.R. 6 Pat. 614

3. (1898) I.L.R. 25 C. 805.

4 (1886) I.L.R. 9 M 375.

5 (1890) I.L.R. 14 M 63.

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and it was held that, though the promissory note was invalid under S. 28 of the Legal Practitioners Act, as it was not filed in any Court within fifteen days of its execution as required by that section, yet, the plaintiff was entitled to recover the amount to which he was found to be entitled for his labour. A similar view was taken in *Anantayya* v. *Padmayya*.[6] In *Sundararaja Aiyangar* v. *Pattanathusami Thevar*[7] and *Narasimhachariar* v. *Sinnavan*[8] this Court held that section 28 of the Act is no bar to a decree being passed for such reasonable remuneration as may be found due on the principle of *quantum meruit*. The question has been discussed at some length with reference to the principle in *Subba Pillai* v. *Ramasami Aiyar*[1] which was also a case where a claim for fees was made by a pleader based upon a promissory note which had not been filed in Court as required by S. 28 of the Legal Practitioners Act and was in consequence invalid. It was held in that case that, though the contract was void, the pleader was still entitled to recover the out-fees advanced by him. In holding so, the learned Judges stated that the Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable unless an agreement made in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in Court. This decision has been followed in *Natesa Mooppan* v. *Ramachandra Aiyar*.[9] The learned Judges in *Subba Pillai* v. *Ramasami Aiyar*[1] seem to base their decision on the policy of sections 28, 29 and 30 of the Legal Practitioners Act, corresponding to sections 4, 9 and 6 of the English Attorney and Solicitors Act, 33 and 34 Vict. c. 28. The policy underlying those sections and their conclusion based upon that policy is thus stated by the learned Judges:

"The policy of sections 28, 29 and 30 of the Legal Practitioners Act, corresponding to sections 4, 9 and 6 of the English Attorney and Solicitors Act, 33 and 34 Vict c 28 is that, whenever an agreement is entered into between a pleader and his client respecting his remuneration or payment for out-fees, such agreement should be reduced to writing and not only so, but also filed in Court and that, when a suit is brought upon such agreement, the Court should have the power if, in its opinion, the agreement is not fair and reasonable to reduce the amount payable thereunder or order it to be cancelled, and, in the latter case, to award such amount

1 (1903) I.L.R. 27 M. 512 14 M.L.J. 274.
6 (1892) I.L.R. 16 M. 278: 2 M.L.J. 247.
7. (1894) I.L.R. 17 M. 306 8 (1896) I.L.R. 20 M. 365.
9 (1914) 27 M.L.J. 728.

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only as would have been decreed in the absence of any agreement between the pleader and his client S 30, however, provides that a pleader shall not be entitled to claim anything beyond the terms of such agreement, except in respect of services, fees, charges or disbursements expressly excepted from the agreement

It seems, therefore, clear that, though an agreement entered into will be invalid unless reduced to writing and filed in Court, yet the pleader is not disentitled, in absence of any agreement, to claim reasonable remuneration in respect of his professional services or the repayment of out-fees advanced by him"

It is argued that this view amounts to an absolute departure from the plain words of section 28 of the Statute and that "if an oral agreement or a written agreement not filed in Court, being invalid under section 28 of the Legal Practitioners Act and therefore unenforceable, is void" (*vide* section 2, clause (*g*) of the Indian Contract Act), as pointed out by their Lordships, then, the plaintiff is not entitled to any relief. I am not inclined to accept this contention in all its entirety, but I agree with it to this extent, that I am prepared to say, with due respect to the learned Judges, that the reasoning on which their conclusion is based does not appear to me to be sound. Having held that the suit contract was void, *i.e.*, unenforceable owing to the provisions of S. 28 of the Act, the learned Judges held that the pleader was entitled to recover the amount mentioned in the agreement, apparently acting on the policy underlying sections 28 to 30 of the Act, which they thought justified them in dealing with the case as if it was one in which there was "an absence of an agreement," *i.e.*, in which no agreement was pleaded by the parties. It is open to question whether the policy underlying sections 28 to 30 of the Act is intended to enable the Court to deal with the case in this manner, when the agreement which is the basis of the suit is void under section 28. These sections refer specifically to "such agreements," *i.e.*, agreements valid under section 28 and provide that in enforcing such agreements Courts may modify or cancel them and that such agreements shall exclude further claims of the pleader, etc., I find it difficult to extract from these sections any policy of the Legislature which would justify the Court in ignoring the provisions of S. 28 when the plaintiff relies on an "agreement" as the basis of his claim. Thus far, I agree with the contentions of the appellant; but having regard to the uniform course of decisions in this Court, I think it must be held that it is too late to give effect to the arguments now urged; and to decline to give the plaintiffs any relief in respect of the 1st plaintiff's claim especially so; as I am prepared to hold that, though the contract is void, the

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respondent in *Subba Pillai* v. *Ramasami Aiyar*[1] is entitled to succeed having regard to the provisions of S. 65 of the Indian Contract Act which deals with the obligation of a person to restore any advantage received by him under an agreement which is "discovered to be void" or to make compensation for it. The section runs as follows:

"When an agreement is discovered to be void . . . . any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it"

The expression "discovered to be void" in this section has caused some difficulty in its application. In *Sibkisor Ghose* v. *Manik Chandra*[10] Mr. Justice Mukerjee pointed out that an agreement which is opposed to S. 28 of the Legal Practitioners Act being *ab initio* void cannot be said to be an agreement discovered to be void within the meaning of S. 65. Since then it has been held by the Privy Council that an agreement "discovered to be void" would include an agreement *ab initio* void. In *Harnath Kuar* v. *Indar Bahadur Singh*[11] their Lordships held that an agreement "discovered to be void" within the meaning of this section is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. This decision has been approved by the Privy Council in *Annada Mohan Roy* v. *Gour Mohan Mullick*,[12] in which their Lordships held that the time at which an agreement is discovered to be void within the meaning of section 65 of the Indian Contract Act is in the absence of special circumstances the date of the agreement. In the case before us, the agreement in question was manifestly void from its inception as it contravened the provisions of S. 28 of the Legal Practitioners Act, and as such an agreement can be described to be one discovered to be void within the meaning of S. 65 of the Indian Contract Act as explained by the Privy Council the defendant's husband was bound to make compensation to the 1st plaintiff for the advantage which he has received under the contract. It has not been argued before us that the sum awarded to the respondents by the Lower Court is excessive or disproportionate to the services rendered by the 1st plaintiff. The decree awarding the plaintiff Rs. 390 can be thus justified under S. 65 of the Indian Contract Act.

1. (1903) I.L.R. 27 M. 512: 14 M.L.J. 274.
10. (1915) 21 C.L.J. 618.
11. (1922) L R. 50 I.A. 69. I.L.R. 45 A. 179: 44 M.L J. 489 (P.C.).
12. (1923) L.R. 50 I.A. 239: I.L.R. 50 C. 929: 45 M.L.J. 617 (P.C.).

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Cornish, J.

I would uphold the decision of the Lower Court and dismiss this Civil Revision Petition with costs.

Cornish, J.—I agree. The agreement made between the pleader and his client as to the pleader's remuneration was a verbal agreement, and, therefore, a compliance with the requirements of S. 28, Legal Practitioners Act, was impossible. That, however, according to the construction put upon the section by the rulings of this Court (see *Rama* v. *Kunji*,[4] *Krishnaswami* v. *Kesava*,[5] *Anantayya* v. *Padmayya*[6] and *Subba Pillai* v. *Ramasami Aiyar*[1]) does not preclude the pleader from recovering the amount which he could properly claim for work done and disbursements made by him on behalf of the client in pursuance of the agreement. The abovementioned decisions make no distinction between a verbal agreement, which is incapable of being filed in accordance with the requirements of S. 28, and an agreement in writing which is invalid because it has not been filed. The view taken by this Court is that the purpose of S. 28 is to give the Court a control over agreements between pleaders and their clients with respect to fees and costs, and is not intended to make the right of the pleader to recover his fees, etc., conditional upon the agreement fulfilling the requirements of the section. A sanction for this view is to be found in S. 29, which enables the Court to order an agreement, otherwise in order "to be cancelled if the agreement is not proved to be fair and reasonable, and the costs, fees, charges and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made." The Calcutta, Allahabad and Patna High Courts have placed a stricter interpretation upon S. 28, holding that the object of the section would be defeated by allowing exceptions to its requirements. But even assuming the stricter interpretation to be preferable it is certainly too late now to resist the current of authority of this Court.

There is no doubt that the relations of the parties are contractual notwithstanding that the agreement is invalid by virtue of S. 28. In the cases where the question has arisen, although it has been recognised that the pleader is entitled to recover, the precise footing upon which he can do so has been left in some uncertainty. In *Rama* v. *Kunji*[4] it seems to have been considered by the Court that the suit by the pleader being for work and labour done, might lie under S. 70, Indian Contract Act. The question was further considered in *Sibkisor Ghose* v.

1. (1903) I.L.R. 27 M 512. 14 M.L.J 274
4. (1886) I L R. 9 M 375. 5. (1890) I.L R 14 M. 63.
6 (1892) I.L R. 16 M 278: 2 M L J. 247

Manik Chandra[10] and it was there pointed out that S. 70 could not apply to a claim based on contract. The learned Judges in that case expressed the further opinion that S. 65, Contract Act, would be unavailing in aid of a claim arising out of an agreement void by section 28 of the Legal Practitioners Act, for the reason that the agreement being void *ab initio* could not be aptly described as an agreement which has been discovered to be, or has become void. All doubt upon this point has, however, been resolved by the ruling of the Judicial Committee in *Harnath Kuar* v. *Indar Bahadur Singh*,[11] where their Lordships laid down that an agreement discovered to be void is one discovered to be not enforceable by law, and on the language of S. 65 would include an agreement that was void in that sense from its inception as distinct from a contract that became void. And in *Annada Mohan Roy* v. *Gour Mohan Mullick*[12] their Lordships emphasise this principle that an agreement is discovered to be void from the date of the agreement. The claim of the plaintiff-respondent before us was, therefore, clearly maintainable.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE CORNISH.

T. M. A. Nathan .. *Petitioner* (Accused).*

Criminal Procedure Code (V of 1898), Ss. 265 and 537—Court of Bench of Magistrates—Judgment—Necessity of all the members of the Bench to sign—Omission by some of the members to sign—If amounts to an illegality—Register embodying sentence signed by all the members but judgment not signed by some of them—Effect—Mere irregularity or illegality—S. 526 (8)—If mandatory—Application for adjournment for the purpose of moving the High Court for transfer—Refusal to grant on the ground of its being made after the beginning of the trial—Effect—If vitiates the whole proceedings.

A judgment of a Court of Bench of Magistrates must be signed by all the members who constitute the Bench

Ramakottiah v. *Subba Rao,* (1928) 55 M.L.J. 576 not followed.

But the omission by some of the members of the Bench to sign the judgment is not necessarily an illegality which vitiates the trial.

Where all the members constituting the Bench of Magistrates signed the register in which the sentence was embodied but some of them omitted to sign the judgment,

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*Cr. Rev Case No. 181 of 1929. 6th September, 1929.
(Cr. R. P. No. 154 of 1929).

10. (1915) 21 C.L.J. 618.

11 (1922) L.R. 50 I.A. 69: I.L.R. 45 A. 179: 44 M.L.J. 489 (P.C).

12 (1923) L. R. 50 I. A. 239: I.L.R. 50 C. 929: 45 M.L.J. 617 (P.C.).

Nathan, *In re.*

Held, that the omission should be treated only as an irregularity which occasioned no failure of justice and, therefore, the trial and conviction were not illegal.

Section 526 (8) of the Criminal Procedure Code is absolutely imperative in its terms and consequently an order of the Trial Court that an adjournment applied for by the accused for the purpose of moving the High Court for a transfer is not granted as it has been made after the trial had begun vitiates the whole proceedings.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Bench of Magistrates, Ootacamund, dated 18th October, 1928, in Summary Trial No. 610 of 1928.

V. L. Ethiraj for petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted by a Bench of Magistrates. He comes up in revision on the ground that the judgment convicting him is illegal, as it has been signed only by the Chairman of the Bench. We think that it is a perfectly good ground of objection. Section 265 of the Code of Criminal Procedure is divided into three sub-sections. The first provides that records and judgments shall be written by the presiding officer in English or in the language of the Court or in his mother tongue. The second prescribes that, if authorised by the Local Government, a Bench may employ a clerk to prepare the record or judgment, which shall be signed by each member of the Bench present and taking part in the proceedings. The third directs that, if no such authority has been given, the record—which, presumably, includes the judgment—shall be prepared by a member of the Bench and signed "as aforesaid" and shall then be "the proper record." The first sub-section says nothing about signing the record or judgment, but deals merely with the language in which they shall be written. The intention, we think, is that, by whomsoever the judgment and record may have been written, they shall be signed by all the members present. We have been referred to a decision *contra* by Devadoss, J., in *Ramakottiah* v. *Subba Rao,*[1] which is based on the wording of S. 367 of the Code of Criminal Procedure. With great respect, we do not consider that that section affords any assistance in the construction of S. 265. The words "presiding officer of the Court" are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments.

1. (1928) 55 M.L.J. 576

Nathan, *In re.*

The Public Prosecutor invites our attention to S. 537 of the Code of Criminal Procedure and argues that the omission should be treated as an irregularity, which has occasioned no miscarriage of justice. It has been held that the failure to comply with a mandatory provision of the Code is not necessarily an illegality. In this case, all the members of the Bench signed the register in which the sentence was embodied. They obviously agreed in the judgment and we do not think that their omission to comply with the technical requirement of the law as to the signing of it was anything more than irregularity, which occasioned no failure of justice.

There is, however, a further and fatal objection. It is founded on that disastrous provision of law, sub-section (8) of S. 526 of the Code of Criminal Procedure which is absolutely imperative in its terms. The petitioner in the course of the trial applied for an adjournment for the purpose of moving the High Court for a transfer but the Bench rejected the application on the ground that it had been made after the trial had begun. That was, of course, no ground at all. Such an application can be made in the course of a trial and must, unfortunately, be granted. To refuse it, contrary to the terms of the section, is to deny the applicant an absolute right conferred on him by the statute and vitiates the whole proceedings.

We set aside the conviction, but, as the case arises out of a family dispute, do not order a retrial.

N.S. *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD CARSON, LORD DARLING, SIR LANCELOT SANDERSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

James R. R. Skinner .. *Appellant**

v.

Robert Hercules Skinner and others .. *Respondents.*

P. C.
Skinner
v.
Skinner.

Registration Act (XVI of 1908), Ss 17, 49—Sale-deed—Agreement for sale—Test—Deed—Construction—Vendor and vendee—Deed unregistered by former in favour of latter creating interest in immoveable property and providing as an integral part of transfer for execution of registered sale-deed—Suit for specific performance on foot of—Maintainability of

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*P. C. Appeal No. 97 of 1928. 1?th July, 1929.

P. C.

Skinner
v.
Skinner.

—*Admissibility of unregistered deed in evidence in—S 47 of Registration Act—Scope and effect of.*

An unregistered deed executed by a vendor in favour of a vendee, in addition to creating an interest in the immoveable property concerned, provided as one of its terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so required, execute a registered sale-deed.

Held, that to allow the vendee to sue for specific performance of that agreement, putting the deed in evidence in proof of it, would clearly be within the prohibition of S. 49 of the Registration Act.

An agreement for the sale of immoveable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provision of S. 17 (2) (*v*), which exempts from registration, and therefore frees from the restriction of S. 49, a document which does not itself create an interest in immoveable property, but merely creates a right to obtain another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to be little more than an evasion of the Act.

Held, agreeing with the Sub-Judge, and differing from the High Court, that the document of the 18th June, 1918 (the terms of which are fully set out in their Lordships' judgment), was a sale-deed requiring registration under S. 17 of the Registration Act, and not a mere agreement for sale.

The language employed is perhaps not that of a trained draftsman, but the document clearly purports to transfer the executant's interest in the immoveable properties which he had inherited from his brother, particulars of which are set out in the schedule.

Appeal from a decision of the High Court of Judicature at Allahabad.

De Gruyther, K.C. and *Brown* for appellant.

Dunne, K.C. and *Raikes* for respondents.

16th July, 1929. Their Lordships' judgment was delivered by

Sir George Lowndes.

SIR GEORGE LOWNDES.—One Richard Skinner died in 1913 intestate, and his estate, which included immoveable properties of considerable value, devolved upon his brother George Skinner and his sister Alice Skinner in equal shares. Richard Skinner was at the time of his death indebted to the Delhi and London Bank, and administration of his estate was granted to a Mr. Angelo, the Bank's manager. On the 18th June, 1918, while the estate was still under administration, George Skinner executed in favour of Robert Hercules Skinner, the first respondent in this appeal, a document in the following terms:—

[*The first sentence is torn out.*]

"This day between Mr. (torn out) at present at Meerut of the one part, hereinafter called the first party, and Mr. R H. Skinner of Hansi of the second part, hereinafter called the second party.

P. C.

Skinner v. Skinner.

Sir George Lowndes.

"Whereas Mr. G. C. E. Skinner, the said first party (paper torn), heir to the estate of his late brother, Mr. R. R Skinner, and the said first party, therefore, as heir has a (paper torn) in the property allotted to the late Mr. R. R. Skinner by the decree of the District Judge, Delhi, of August, 1888, partitioning the joint Skinner estate; and in all the property he subsequently acquired. And that whereas my brother R. R. Skinner died in about August, 1913, and that since his death there has been constant trouble and long, expensive and ruinous litigations and family disagreement, etc, owing to which vendor has not been able to get possession up to date, nor gets any benefit from it whatsoever.

"That whereas now Mr. R. H. Skinner of the second part, hereafter called the vendee, has agreed to purchase all these properties left me by my said late brother, Mr. R. R. Skinner.

"Therefore I, G. C. E. Skinner of the first part, hereafter called the vendor, with my free will, wishes and consent do hereby sell all my share, I have inherited from my late brother, Mr. R. R. Skinner, to Mr. R. H. Skinner for Rs. 50,000, to keep the property in the family and for all what the vendee has done for me, it is therefore mutually agreed as follows:—

"(1) That the vendee, Mr. R H. Skinner, do pay to the said vendor, Mr. G. C. Skinner, Rs. 1,000 as earnest money by cheque.

"(2) That as all this property is in the hand of Mr. Angelo, the administrator of the estate of my late brother, Mr. R. R. Skinner, the vendor will do his best to get the vendee full possession.

"(3) Should for any reason the vendor fail or do not satisfy the vendee, in this case the vendee has my free consent to take any action he considers proper and necessary to get full possession, and mutation of names done in the said vendee's favour.

"(4) From the date of agreement all expenses for litigation now pending which, if the vendor chooses to hand over to the vendee or that may hereafter be filed by the vendee in the above matter, will be borne by the vendee.

"(5) That the cases now pending and all matters with reference to these properties, the said vendor shall give a correct and complete list of all cases, also a list of all papers and books, etc., in the possession of the said vendor to the said vendee and take a receipt for any reason, the vendor fail, the vendor will be responsible for loss, etc, and not the vendee.

"(6) In addition to the price stated above the said vendee will have to pay the Delhi and London Bank, Delhi, vendor, share of the debt left by the late Mr. R. R. Skinner, but the said vendor will pay all debts the said vendor may have contracted on this said property after the death of the late Mr. R. R. Skinner and release it for the vendee.

"(7) That the vendor declares that he is the sole heir to this said property, but should other heirs be established . . . . by order of any Court the vendor is not responsible.

"(8) The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs, or assigns, etc., in favour of the said vendee . . . . and if the vendee should ever consider necessary to execute a registered sale-deed . . . . vendor or his heirs, assigns, etc, will always be ready to execute and register the same at the expenses of the vendee.

"(9) In virtue of this sale and agreement if the vendee considers necessary the vendor will always be ready to execute and register a power-

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of-attorney or give the vendee any other document or help the vendee may demand.

"(10) The balance of Rs 49,000 will be paid by the vendee to the vendor the very year the vendee gets full legal possession of all the properties and the mutation of names all affected in the name of the vendee

"(11) Should the vendee not be able to get mutation of names done in his name and get full and complete possession during the lifetime of the vendor, the vendor in such case directs the vendee or his heir, Mr. J. A. R. Skinner, to pay the balance due to the heirs of the vendor.

"(12) The schedule of the properties sold is hereunto annexed as noted below:—

"(a) All the properties noted in the decree of the District Judge, Delhi, August, 1888, partitioning the joint Skinner estates. (*Ingram* v *Orde and other.*)

"(b) All the properties acquired by the late Mr. R. R. Skinner up to the time of his death. Therefore we, the undersigned, further confirm and ratify this sale and agreement by our signatures......................

"MEERUT, 18*th June*, 1918.

(Sd.) GEORGE C. E. SKINNER, *Vendor*
(Sd.) R. H. SKINNER, *Vendee.*"

This document was not registered.

George Skinner died intestate in December, 1919, and on the 11th February, 1921, the first respondent instituted the suit out of which this appeal arises. The only defendant to the suit as originally framed was Angelo, the administrator of Richard Skinner's estate, and the principal prayer of the plaint was for specific performance of "the agreement of sale, dated 18th June, 1918"—the reference being to the document above set out—and for possession of the property. It is obvious that Angelo did not represent George Skinner's estate, and it is admitted that in this respect the suit was defective, but various parties were subsequently added, including Alice Skinner, whose right to a half-share in Richard Skinner's estate was disputed in the Court of first instance, and Thomas Skinner, the third respondent, who was appointed administrator *ad litem* of George Skinner. Major Stanley Skinner was also substituted for Angelo as administrator of Richard Skinner, and on the death of Alice Skinner, pending the proceedings in India, James Skinner, the present appellant, was brought on the record as her executor.

Various matters were debated in the course of the proceedings in India, with which their Lordships have not been asked to deal, but the principal issue in the case, and that upon which the determination of this appeal depends, was whether the document of the 18th June, 1918, was admissible in

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evidence. This in the argument before the Board has resolved itself into two questions, viz., (1) whether the document comes within the provisions of section 17 of the Indian Registration Act (XVI of 1908) and so required registration; and (2) whether, if registration was necessary, it could form the basis of a suit for specific performance notwithstanding the provisions of section 49.

On the first question the Subordinate Judge by whom the suit was tried was of opinion that the document was a sale-deed requiring registration under section 17, and that, being unregistered, it was not admissible in evidence, and he accordingly dismissed the suit. The High Court, on appeal, differed from this conclusion. The learned Judges held that the document ought to be "treated as being an agreement for sale rather than as a sale-deed," and that, therefore, registration was not necessary, and they made a decree for specific performance in respect of George Skinner's moiety of the property upon certain terms. Against this decree the executor of Alice Skinner has appealed to His Majesty in Council.

In the course of the arguments the document of the 18th June, 1918, has been discussed with great minuteness, but their Lordships have no doubt that the view taken of it by the Subordinate Judge was right. The language employed is perhaps not that of a trained draftsman, but it clearly purports to transfer George Skinner's interest in the immoveable properties which he had inherited from Richard Skinner, particulars of which are set out in the schedule, and it accordingly comes within the terms of section 17 of the Act and required registration.

The second question is perhaps a more difficult one, though the difficulty arises rather from the divergent views to be found in the Indian case-law on the subject than from the interpretation of section 49 of the Registration Act. It is unfortunate that this aspect of the case was not submitted to the Indian Courts, and their Lordships have therefore not had the assistance of the High Court in discussing the numerous decisions which have been referred to before them.

Their Lordships, however, think that the meaning of S. 49 is clear. The section runs as follows:—

"49 No document required by section 17 to be registered shall—

(a) affect any immovable property comprised therein; or

(b) confer any power to adopt; or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered.".

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If an instrument which comes within section 17 as purporting to create by transfer an interest in immoveable property is not registered, it cannot be used in any legal proceedings to bring about indirectly the effect which it would have had if registered. It is not to "affect" the property, and it is not to be received as evidence of any transaction "affecting" the property.

In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale-deed, and it is contended for the first respondent that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of immovable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a change of ownership. The intention of the Act is shown by the provision of S. 17 (2) (*v*), which exempts from registration, and therefore frees from the restriction of section 49, a document which does not itself create an interest in immovable property, but merely creates a right to obtain another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

A number of cases from the Indian Reports have been referred to on either side in the argument before this Board, and it is clear that many of the decisions are irreconcilable. Their Lordships think, therefore, that no good purpose would be served by a detailed examination of them, but they have the satisfaction of knowing that the principle which has been enunciated above is in accordance with recent decisions in most of the High Courts. See *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri*,[1] *Satyanarayana* v. *Chinna Venkatarao*[2] and *Ramling Parwatayya* v. *Bhagwant Sambhuappa*.[3]

For the reasons given their Lordships are of opinion that the High Court was wrong in granting a decree for specific perform-

1 (1921) I L R 49 C 507.
2. (1925) I.L.R. 49 M 302. 50 M L J 674.
3. (1925) I.L.R. 50 B. 334.

ance, and that the first respondent's suit should have been dismissed. They will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside, and that of the Trial Judge restored. The first respondent must pay the appellant's costs both here and in the High Court.

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Solicitors for appellant: *Chapman, Walker & Shepherd.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ATKIN, SIR JOHN WALLIS, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

Mahant Basdeva Nand Gir .. *Appellant**

v.

Mahant Shantanand Gir .. *Respondent.*

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Basdeva Nand Gir v. Shantanand Gir.

Hindu Law—Religious Endowment—Math—Mahant of—Deed relating to Mahantship executed by—Effect of—Abdication by executant entirely from position of Mahant or appointment of deputy for a time—Relinquishment of office and of right to property merely or effective transfer of rights to, and appointment of, another also—Test—Privy Council Appeal—New plea depending largely on facts—Permissibility—Deed—Effect of—Plea as to.

G, the then properly appointed and duly installed Mahant of a Math, purported to appoint as Mahant one *N* Within a few months of his appointment, *N*, by a formal deed, purported to relinquish his office, and *G* took his place again as Mahant Shortly after, that is, in August of 1918, *G*, as Mahant, appointed one *S* as his successor In October of 1918, *S* executed a document which, after reciting that he (*S*) was not conversant with the customs and had no insight into the management of the *ilaqas* appertaining to the *gaddi*, and that there might be ill consequences to the Math in consequence, and also that, on account of the affairs of the *gaddi*, he could not prosecute his studies well, went on to say:—

"It is also my intention that I should sever my connection with it and pass my days for some time outstation and prosecute my studies and acquire the qualifications of a *gaddi-nashin* Mahant. Therefore I return to my *guru* *G* all the powers which I had acquired under the document mentioned above, dated the 3rd of August, 1918"—that is, the document of appointment—"for good management of the *gaddi* and the *ilaqas* appertaining thereto. My *guru* *G* shall have right (*haq*) to exercise at present and also in future all the powers which he used to exercise before as Mahant *gaddi-nashin* I shall have no objection till I acquire full literary qualifications and the qualifications to make management and those of a *faqir* (ascetic) as required for the *gaddi* "

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*P. C. Appeal No. 75 of 1928. 28th June, 1929.

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Held that, on the right construction of the deed of October, 1918, *S* did not thereby abdicate entirely from the position of Mahant, but merely appointed *G* to act as his deputy.

Every phrase in the deed, if full effect be given to it, seems to indicate that *S* desired to remain Mahant, that he was absenting himself for a time, and that he was for the time appointing a delegate to act for him in his duties during his absence. That intention seems to be made plain by all the words, which seem to point to a mere temporary absence and to his intention to remain as Mahant.

Semble: The deed by which *N* purported to relinquish his office was effective to transfer to *G* the Mahantship and the property, and *N* in executing it meant, before he resigned, to transfer the spiritual rights and temporal rights to *G*, and effectively did so.

Their Lordships, however, declined to allow the point as to the true effect of the deed executed by *N* to be raised for the first time before them on the ground that it would depend, or might depend, very largely upon questions of fact.

Appeal from a decision of the High Court of Judicature at Allahabad.

Upjohn, K.C. and *Dube* for appellant.

Dunne, K.C. and *Hyam* for respondent.

28th June, 1929. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This appeal comes before the Board on appeal from the High Court of Judicature of Allahabad. It is a suit which raised the question as to who was entitled to the Mahantship of the Math Baghambari at Allahabad, and the question arises in respect of transactions which commenced in the year 1917. At that time there is no question but that the Mahant properly appointed and duly installed was a man named Gyananand. In March, 1917, he purported to appoint as Mahant a man named Narayan, and on November 21, 1917, by a formal deed Narayan purported to relinquish his office. He expressed his intention of retiring from the disciples and leading the life of an ordinary householder. As far as Gyananand is concerned and as far as the disciples of Narayan are concerned, the effect of that transaction was that Narayan disappeared and that Gyananand took his place again as Mahant.

In August of 1918, Gyananand, as Mahant, appointed as his successor the present plaintiff, one Shantanand, and no question is raised but that, if Gyananand was Mahant at that time, the appointment of Shantanand was an effective appointment

But in October of 1918 Shantanand executed a document upon which this case appears to turn. There are two views possible in respect of it. One is that Shantanand expressed his intention of withdrawing from Allahabad for a period suffi-

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cient to enable him to improve his education, increase his religious knowledge, and become qualified to deal with the affairs of the Math, and that he appointed Gyananand to act as his deputy. The other view is that Shantanand abdicated entirely from the position of Mahant and either did or did not—it is not quite clear on the contention—appoint Gyananand to be his successor. But in any case, if he had entirely withdrawn and abdicated, it has not been suggested that he was reappointed, and therefore he would have no title to sue as Mahant and his action would come to an end.

In September of 1919, Gyananand, in the absence of Shantanand, who was still pursuing his studies abroad—that is to say, away from Allahabad—appointed the defendant Basdeva. But within a short time he seems to have been dissatisfied with Basdeva and, in pursuance of a power which he appears to have reserved for himself in the deed under which he appointed Basdeva, he cancelled the appointment and deposed Basdeva for misconduct. Nevertheless, Basdeva remained in possession, and it is against him that this action is brought.

Counsel for Basdeva, feeling that he would have a difficulty, in view of the argument which he had to adduce to destroy the plaintiff's title, in saying that Basdeva had got any better title, relies upon the weakness of the plaintiff's title rather than on the validity of any title of his own.

The two points that have been raised before the Board are these: It is said, in the first place, that Narayan had been appointed, validly appointed, Mahant by Gyananand, and it is said that thereupon Gyananand's functions to appoint anybody had ceased; he was *functus officio*. It is said that Narayan, by the deed which he executed of the 21st November, 1917, merely relinquished his office and relinquished his right to the property, but did not in fact make any effective appointment of a Mahant. The consequence would appear to be, if that were true, that from that date there never has been a properly-appointed Mahant or anybody, in fact, entitled to the property of the Math—a very serious position and one which would require very careful consideration before a Court arrived at that conclusion. But it is sufficient for their Lordships to say that that point does not appear to be open to the defendant, the appellant. It was not made in the Court below; there is no issue directed in respect of it, and it seems obvious that that is a point that would have to be raised and very carefully con-

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sidered, and would depend, or might depend, very largely upon questions of fact, upon the nature of the custom of the Math, and upon the conduct of the disciples Gyananand, Narayan, and everybody else after this supposed deed. There is no trace of its having been argued in the High Court of Allahabad either before the first Judges before whom the appeal came or before the learned Judges on the Letters Patent appeal, and it is not even raised in the appellant's case. Their Lordships have no doubt whatever that in those circumstances this point is not one which is open to the defendant to raise before them. But, in saying so, lest it should be supposed they entertained any doubt as to the Mahantship and its property after Narayan had executed this deed, their Lordships think it proper to say that, on their view of the deed, as at present advised, they are of opinion that the deed was effective to transfer to Gyananand the Mahantship and the property, and that Narayan in executing it meant, before he resigned, to transfer the spiritual rights and the temporal rights to Gyananand, and effectively did so That is the proper construction of the deed.

Leaving this contention aside, it is clear that when Shantanand was appointed, Gyananand was the Mahant, and Shantanand was therefore validly appointed.

The question that remains, therefore, is the construction of the document of the 9th October, 1918. There have been different translations of that document; but taking the official translation as put before the Board, which has been slightly amended by one of the learned Judges (and everybody appears to be content to take the document with the amendments made by that learned Judge) it appears to their Lordships that the view taken of it by the learned Subordinate Judge and by the members of the High Court on the Letters Patent appeal is the correct view, and that the Chief Justice has expressed accurately the true reasons for arriving at the construction which he eventually adopted. On the evidence, the right view is that this document is a *bona fide* document. It expresses the real intentions of the person who executed it, Shantanand, the then Mahant. It recites that he is not conversant with the customs and had no insight into the management of the *ilaqas* appertaining to the *gaddi*, and that there may be ill consequences to the Math in consequence. He says also that, on account of the affairs of the *gaddi*, he cannot prosecute his studies well. The translation goes on to say:—

"It is also my intention that I should sever my connection with it and pass my days for some time outstation and prosecute my studies and

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acquire the qualifications of a *gaddi-nashin* Mahant Therefore I return to my *guru* Swami Gyananand Girji Maharaj all the powers which I had acquired under the document mentioned above, dated the 3rd of August, 1918''—that is, the document of appointment—''for good management of the *gaddi* and the *ilaqas* appertaining thereto. My *guru* Swami Gyananand Giriji shall have right (*haq*) to exercise at present and also in future all the powers which he used to exercise before as Mahant *gaddi-nashin*. I shall have no objection till I acquire full literary qualifications and the qualifications to make management and those of a *faqir* (ascetic) as required for the *gaddi*.''

It appears to their Lordships, when that document is read in light of the circumstances under which it was executed, that there can be no real doubt that the meaning to be put on the document is that adopted by the High Court. In other words, Shanta, having been appointed to this high office with all its advantages, spiritual and temporal, had no intention of laying down the office entirely. He was not retiring altogether with the expectation, which might well be founded or not, that if he were to return he might in the future be fortunate enough to be, by somebody who was Mahant at that time, reappointed Mahant. On the contrary, every phrase in it, if full effect be given to it, seems to indicate that he desired to remain Mahant, that he was absenting himself for a time—an occurrence which their Lordships understand is a common occurrence among Mahants—and that he was for the time appointing a delegate to act for him in his duties during his absence. That intention seems to be made plain by all the words, which seem to point to a mere temporary absence and to his intention to remain as Mahant.

For these reasons it appears to their Lordships that they have no reason to differ from the view taken by the Chief Justice and Mr. Justice Dalal, and that this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent: *Barrow, Rogers & Nevill.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD TOMLIN, LORD SALVESEN AND SIR BINOD MITTER.

Gnanendra Kumar Roy Chowdhury and others .. *Appellants**

v.

Prafulla Nath Thakur .. *Respondent.*

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Gnanendra Kumar Roy Chowdhury *v.* Prafulla Nath Thakur.

Zemindary—Lands within ambit of—Zemindar's title to—Presumption of—Claim adverse to—Onus of proof of—Privy Council appeal—Plaint—Ambiguity in—Defence plea of—Maintainability—Ambiguity, if any, removed even before Trial Judge—No application by defendants to Courts below for opportunity to adduce further evidence on ground of original ambiguity.

Plaintiff was the owner of a zemindary which included mouza *C. De*. He sued for the recovery of possession of the suit lands which were situated within the said mouza. The defendants, who owned three *howlas* in the said mouza, claimed the suit lands as being within their *howlas*.

Held that, as the plaintiff's title as Zemindar was not questioned, and the suit lands were admittedly within the ambit of the zemindary, on failure of the defendants to prove that the suit lands were within their own *howlas*, the plaintiff was entitled to a decree.

In a case in which the defendants complained before the Privy Council of the ambiguity in the plaint as to the title in which the plaintiff claimed the suit lands, it appeared that all doubt as to the real meaning of the plaint was set at rest when the matter came before the Trial Judge, that before him the real title in which the plaintiff claimed was raised, that from that time onward that aspect of the case was kept well to the front, but that the defendants never applied for an opportunity of calling further evidence on the ground that they had been originally misled by the ambiguity in the plaint.

Held that it was too late for the defendants to rely upon any alleged ambiguity in the plaint in the appeal to the Privy Council.

Appeal from a decision of the High Court of Judicature at Fort William in Bengal.

De Gruyther, K. C. and *Parikh* for appellants.

Dunne, K. C. and *Raikes* for respondent.

4th June, 1929. The judgment of their Lordships was delivered by

Lord Tomlin.

LORD TOMLIN.—This is an appeal by the defendants in the suit against a decree dated the 9th July, 1925, of the High Court of Judicature at Fort William in Bengal.

The decree of the High Court affirmed the decree dated the 8th March, 1923, of the District Judge of Barisal, reversing (except in one minor respect) a decree dated the 22nd September, 1921, of the Subordinate Judge of Barisal.

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*P. C. Appeal No. 130 of 1927. 4th June, 1929.

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As a result of the decisions of the District Judge and the High Court the plaintiff holds a decree for the recovery of possession from the defendants of certain alluvial lands in Mouza Chur Daiya, which is part of the plaintiff's zemindari.

By this appeal the defendants seek to have this decree reversed and to have the plaintiff's suit dismissed.

The plaintiff raised a preliminary objection to the appeal based upon the allegation that the value of the subject-matter of the suit or of the appeal was less than Rs. 10,000, but their Lordships are of opinion that this objection was not well founded, and that the appeal must be dealt with on its merits.

The plaintiff and his predecessors-in-title have been at all material times and the plaintiff now is entitled to a zemindari which includes Mouza Chur Daiya and the adjoining Mouza Daiya.

In Mouza Chur Daiya there are four *howlas*, of which three, namely, Komar Ali, Asraf Ali and Ensan Bibi, belong to the defendants, who acquired them by auction purchase.

The fourth *howlah*, namely, Ram Manikya Pal, was in the past acquired by auction purchase by the plaintiff or one of his predecessors-in-title and is now the property of the plaintiff.

The plaintiff or one of his predecessors-in-title also acquired by auction purchase the taluk of Adinath Roy, and the same is now owned by the plaintiff. This *taluk*, according to the plaintiff's case, comprised lands both in Mouza Daiya and in Mouza Chur Daiya, but the Subordinate Judge and the District Judge came to the conclusion that it had not been proved that any part of the lands of the *taluk* were situated within Mouza Chur Daiya.

For many years the northern part of Mouza Chur Daiya (including the defendant's *howlas*) has been submerged by the Maskata River, which bounded the mouza towards the north.

Recently the lands in dispute, which are admittedly within the Mouza Chur Daiya, were reformed. They are not yet fit for cultivation. Upon their reformation these lands were taken possession of by the defendants. The plaintiff on his part laid claim to them, and on the 27th May, 1919, with certain other formal parties, filed a suit for recovery of possession in the Court of the Subordinate Judge of Barisal.

In his plaint the plaintiff stated his title as Zamindar and alleged that his zemindari included the Mouza Chur Daiya.

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The plaintiff further alleged that no right could accrue to the defendants in respect of the disputed lands, that during the settlement measurement of 1903 the entire lands of the defendants' *howlas* were found intact, and that the disputed land was the *khas* land appertaining to the plaintiff's Taluk Adinath Roy included in their zemindari.

The plaintiff then claimed by way of relief that a decree for possession might be passed in favour of the plaintiff upon establishment of his right to hold *khas* possession of the land in suit and that the defendants might be evicted therefrom.

The defendants in their written statement denied that there was any *taluk* called Adinath Roy in Chur Daiya, and alleged that the disputed lands were reformations on the original sites of their *howlas*.

A Commissioner was appointed to hold a local enquiry, and his report was made on the 24th June, 1921. He came to the conclusion that there was no proof that the disputed land formed part of the Taluk Adinath Roy. He prepared a map upon which he showed the boundaries of the defendants' *howlas* as indicated in the Settlement Record of 1903, and he drew the conclusion that a small portion of the disputed lands marked A on his map, being the extreme south-west corner of such lands, was part of the defendants' *howlas*, and that except to this extent it could not be said that the disputed lands were included in the defendants' *howlas*.

The matter came to trial before the Subordinate Judge, and on the 22nd September, 1921, he dismissed the suit. The learned Subordinate Judge called attention to the contention of the plaintiff that he as Zamindar was the owner of the entire mouza and as such entitled to get possession of every bit of land save and except the small quantity which might be found to appertain to the defendants' *howlas*. He did not, however, deal with this contention, but held that the plaintiff had not proved that the lands in dispute formed part of Taluk Adinath Roy and dismissed the suit.

The plaintiff appealed, and in his grounds of appeal made it clear that he was claiming the lands in dispute in zemindari right as well as in taluki right in respect of Taluk Adinath Roy.

On the 8th March, 1923, the District Judge reversed the Subordinate Judge and decreed in the plaintiff's favour recovery of possession of the lands in dispute, except the small portion marked A on the Commissioner's map. This portion the plaintiff no longer claimed.

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The District Judge held that it was not shown that the *howlas* of the defendants were nearly co-extensive with the total area of the mouza, *i.e.*, so as to include the lands in dispute other than the portion marked A on the Commissioner's map, and that it was not conclusively shown, though it was probable, that lands of Taluk Adinath Roy were included in the mouza. He then pointed out that the plaintiff was Zamindar of the mouza, and, as far as the suit was concerned, was suing as such, and held that the burden of proof lay on the defendants to show that the disputed lands were within their *howlas*.

The defendants appealed to the High Court, and on the 9th July, 1925, the High Court delivered judgment dismissing the appeal.

The defendants obtained leave to appeal to His Majesty in Council, and appealed accordingly.

It was but faintly contended before their Lordships' Board that if the plaintiff was entitled to rely upon his title as Zamindar, the result of the suit, having regard to the findings of the District Judge, could be other than it was before the High Court. The plaintiff's title as Zamindar is not questioned. The lands in dispute are admittedly within the ambit of the zemindari and the defendants have failed to prove (except in respect of the portion marked A) that the lands are within their own *howlas*. In their Lordships' judgment, upon such a state of facts the plaintiff must succeed.

It has, however, been urged by the defendants that the only case raised by the plaintiff in his plaint was one based upon his ownership of the taluk, and that therefore he is not entitled to succeed in his zemindari title if he has failed (as admittedly he has) to establish his taluki title.

In their Lordships' judgment, the plaint was intended to raise the case of zemindari title, as well as that of taluki title, and the point which was before each of the Courts below is open to the plaintiff before their Lordships' Board. Even if, however, the plaint be regarded as ambiguous, all doubt as to its meaning was set at rest when the matter came before the Subordinate Judge. Before him the case of zemindari title was raised, and from that time onward that aspect of the case was kept well to the front. If the defendants were originally misled by the language of the plaint and desired an opportunity of calling further evidence directed to the case of zemindari title it was their duty to make their application at the earliest possible moment. No such application was in fact made, and it may

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well be because there was not available any material beyond that already before the Court. It is now too late, in their Lordships' opinion, for the defendants to rely upon any alleged ambiguity in the plaint.

In the result, therefore, their Lordships are of opinion that the judgment of the High Court was right and that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Solicitors for appellants: *Downer & Johnson.*

Solicitors for respondent: *W. W. Box & Co.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

A. V. Subba Rao .. *Petitioner.**

Subba Rao, *In re.*

Legal Practitioner—Fee certificate—Adjustment of fee otherwise than by actual payment—Validity of certificate—Promissory note executed for fee—If amounts to payment of fee—Madras Civil Rules of Practice, Ch. X—Rules relating to Legal Practitioners, R. 30, Note (ii)—Validity.

There may be cases in which the fee due to a vakil may be adjusted otherwise than by actual payment of money. Such an adjustment, however, should be something more than a mere agreement to pay When a promissory note, especially, a negotiable instrument, is given, it may be equivalent to payment. A certificate may not be dishonest even if no fee was received and it may be too strong an expression to describe such a certificate as a false certificate.

It is doubtful if Note (ii) to R. 30 of the Legal Practitioners' Rules is strictly correct

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the District Court of Ganjam, dated 17th January, 1929 and made in E.A. No. 4 of 1929 (E.A. No. 113 of 1928, in E.A. No. 38 of 1926, in E.P. No. 58 of 1925 on its file).

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar* for petitioner.

The Advocate-General amicus curiae.

The Court made the following

ORDER.—There may be cases in which the fee due to a vakil may be otherwise adjusted, by which I mean an adjustment amounting to more than a mere agreement to pay, though

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*C.R.P. No. 899 of 1929. 17th September, 1929.

no actual money has passed. In such cases the fee certificate cannot be said to be false. When a promissory note especially a negotiable instrument is given it may be equivalent to payment and I doubt if Note (*ii*) to Rule 30 in Legal Practitioners' Rules is strictly correct. But, as a matter of policy, the object of the rule seems to discourage the taking of promissory notes by Advocates. Subba Rao, *In re.*

The cases abovementioned show that a certificate may not be really dishonest even if no fee was received. In such cases it may be too strong an expression to describe the certificates as "false certificates."

In the present case, the Judge himself says "no personal criticism was intended." I take this to be an expression of the Judge's opinion that the Advocate was an esteemable person and is incapable of improper conduct. The later remarks merely show that the Advocate might have been misled by the practice or otherwise.

I do not think any order is necessary in the matter.

N.S. *No order passed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Yagammal .. *Petitioner** (*Plff.*)

v.

Arulayee Ammal and others .. *Respondents* (*Defts.*).

Civil Procedure Code (*V of* 1908), *S* 151, *O.* 9 *and O.* 43, *R.* 1 (*c*)—*Partition suit—Preliminary decree—Order dismissing the suit for default of appearance subsequent to the preliminary decree—Validity—Appeal—Maintainability.* *v.* Arulayee Ammal.

A partition suit is not liable to be dismissed for default after the passing of the preliminary decree.

Lachmi Narain Marwari v *Balmakund Marwari*, (1924) L R. 51 I.A. 321 I.L.R. 4 Pat. 61 47 M.L.J. 441 (P C) relied on

An order by the Trial Court dismissing a suit for default after the passing of the preliminary decree cannot be treated as one made under the provisions of Order 9 of the Civil Procedure Code, and although the application to restore the suit purports to have been made under O. 9, R. 9 of the Code, it is not in fact governed by the provisions of that Chapter at all but must be deemed to be an application made under section 151 of the Code and, therefore, no appeal lies under O 43, R 1 (*c*) of the Code against the order of the Court dismissing such an application

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*C.R.P. No. 663 of 1926. 30th October, 1929.

Yagammal v. Arulayee Ammal.

Petition under sections 115 and 151 of Act V of 1908 praying the High Court to revise the order, dated 9th May, 1925, of the Court of the District Munsif of Paramakudi in O.S. No. 744 of 1921.

A. V. Narayanaswami Aiyar for petitioner.

R. Narasimhachari and *K. Muthuswami Chetty* for respondents.

The judgment of the Court was delivered by

Venkatasubba Rao J.

Venkatasubba Rao, J.—The main question in the Civil Revision Petition is, is a suit liable to be dismissed for default after the passing of the preliminary decree? The plaintiff filed this suit for partition and in 1923 obtained a decree directing certain items to be partitioned. From this judgment, she filed an appeal and the Appellate Court varied the decree in her favour by directing partition of some additional items. When the case went back to the Trial Court, it fixed a date for the appearance of parties. Neither the plaintiff nor the defendant having appeared on the day fixed, the Court made an order on the 9th of May, 1925, dismissing the suit for default. It is this order that is impeached in the revision petition before us. On the merits there can be no question that this order cannot be supported. As pointed out by the Privy Council

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside." (*Lachmi Narain Marwari* v *Balmakund Marwari*[1]).

A similar view was taken by the Allahabad High Court in an earlier case. See *Masum-un-nissa* v. *Latifan.*[2]

But then a preliminary objection is raised that this revision petition does not lie. The argument may be thus stated. The plaintiff applied to the Lower Court for the restoration of the suit under O. 9, R. 9, Civil Procedure Code. That application was dismissed by an order, dated 16th March, 1926. The respondent contends that an appeal lies from the last mentioned order under O. 43, R. 1 (*c*) and that the High Court ought not to exercise its revisional powers when the party aggrieved has a remedy by way of appeal The answer is simple. The order dismissing the suit cannot be treated as one made under the provisions of O. 9, Civil Procedure Code That is the effect of the decision of the Privy Council to which we have referred. It follows necessarily that, although the plaintiff's application to

1 (1924) L.R. 51 I.A 321: I.L.R. 4 Pat 61: 47 M L.J. 441 at 446 (P.C).
2. (1910) I.L.R 32 A. 319.

restore the suit purports to have been made under O. 9, it is not in fact governed by the provisions of that chapter at all. It must be deemed to be an application under S. 151 for the exercise of the Court's inherent powers. The preliminary objection thus fails.

Yagammal v. Arulayee Ammal.

Venkatasubba Rao, J.

In the result, we allow the Civil Revision Petition and set aside the order of the Lower Court, dated the 9th May, 1925. The District Munsif will restore the case to his file and allow the plaintiff to take further proceedings in the suit.

In the circumstances, we direct each party to bear his costs.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Kondalu Aiyar .. *Appellant* (Petnr. in C M P. No. 4152 of 1929 on the file of the High Court).*

Kondalu Aiyar, *In re.*

Letters Patent (Madras), cl 15 as amended—Second appeal—Application for stay of execution of decree of Lower Appellate Court—Order of dismissal of application by a single Judge of High Court—If one made in the exercise of appellate jurisdiction—Appeal—Maintainability.

An order passed by a single Judge of the High Court dismissing an application for stay of execution of the decree of the Lower Appellate Court made in a pending second appeal is one made in the exercise of his "appellate jurisdiction" within the meaning of the amended clause (15) of the Letters Patent and, consequently, no appeal lies from such an order unless the Judge who has passed the order declares that the case is a fit one for appeal.

Appeal under clause (15) of the Letters Patent against the order of the Honourable Mr. Justice Jackson, dated 4th October, 1929, and passed in C.M.P. No. 4152 of 1929, presented to the High Court for stay of execution of the decree of the District Court of Tinnevelly in A.S. No. 133 of 1929 (O.S. No. 160 of 1927 on the file of the Court of the District Munsif of Tinnevelly) pending S.A. No. 928 of 1929 preferred therefrom to the High Court.

K. V. Venkatasubramania Aiyar and *P. N. Appuswami Aiyar* for appellant.

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*L.P. A. No 103 of 1929 23rd October, 1929.

Kondalu Aiyar, *In re.*

The Court delivered the following

JUDGMENT.—This is a Letters Patent Appeal from the judgment of Mr. Justice Jackson and the question is, does the appeal lie? There was a Second Appeal filed, and in that an application was made for stay of execution of the decree of the Lower Appellate Court. The application was dismissed by Mr. Justice Jackson and this is an appeal from his order.

It is on account of the recent amendment of the Letters Patent that the present question arises. There was no certificate granted by the learned Judge declaring that the case is a fit one for appeal. Mr. Venkatasubramania Aiyar's contention is this. The order in question is not a judgment passed by the High Court in the exercise of its appellate jurisdiction. The very expression "Appellate Jurisdiction," he contends, involves a scrutiny of a proceeding of an inferior Court. The order of the High Court refusing stay is not related to any order of the Lower Court and has an independent existence. Moreover, power to grant or refuse stay is conferred on the High Court by an express provision in the Civil Procedure Code. On these grounds, he maintains, that the order in question was not made by a Judge of the High Court in the exercise of his appellate jurisdiction. This contention involves a fallacy. A similar argument was advanced in *Sadaka Muhammad* v. *Hayath Batcha Sahib*[1] with reference to an interlocutory order in a Civil Revision Petition. Kumaraswami Sastri and Wallace, JJ., made the following observation:

> "It is difficult to see how there can be any application apart from the Civil Revision Petition filed in the High Court as a party could not, without filing a Civil Revision Petition in the High Court, ask for stay of execution of the decree in the Lower Court"

These remarks apply to the present case. The application to the learned Judge could not have been made independent of, and apart from, the second appeal that was pending. We must, therefore, hold that it was the appellate jurisdiction of the High Court that was invoked and that the order was made in exercise of that jurisdiction. *Sri Sri Sri Chandra Chudamani Raja Harischandra Jagdev* v. *Lokkeno Patnaik*, S.R. No. 12731 of 1928 (decided by Ramesam and Thiruvenkatachariar, JJ.) is a direct case on the point and supports our view. The appeal is dismissed.

N.S. *Appeal dismissed.*

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1. (1927) 54 M.L.J. 323.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Varadaraja Perumal Koil, Melaviraraghavapuram through its Honorary Superintendents (1) G. Ramabhadra Aiyar and (2) Ramier and another .. *Appellants** (*Defts.*)

v.

V. Muniappa Pillai and others .. *Respondents* (*Plffs.*).

Varadaraja Perumal Koil Melaviraraghavapuram v. Muniappa Pillai.

Contract Act (IX of 1872), S 74—Lease deed for term—Money paid as deposit by lessee under—Deposit in legal sense of term if—Forfeiture of amount on breach of contract—Liability for—Lease-deed—Construction—Deposit in legal sense of term—Requisites of—Forfeiture of deposit on breach of contract by payer—Law as to.

A lease deed, which bore date the 15th of April, 1920 and was for a term of seven years, provided that the sum of Rs. 3,210, the annual rent fixed, should be paid in two equal instalments before the 30th December and the 30th June of each year, and that, in default of payment of rent, the lessor was to be at liberty to re-enter and take possession not only of the land leased but also of any crops standing on it. The deed provided further that the lessee was entitled to interest on the sum of Rs. 2,676 paid as a deposit by him at 6 per cent. per annum and that he might adjust that interest against the rent payable on the 30th June of each year. As regards the principal of the deposit amount, the deed provided that it was to be adjusted against the rent payable for the last, that is the seventh, year of the lease.

The lessee made default in the payment of rent that fell due on the 30th of June, 1921, and thereupon the lessor immediately enforced his right of re-entry, and took possession of the land with the standing crops thereon.

On a question arising as to whether the lessee was entitled to the return of his deposit, less the rent that became payable on the 30th June, 1921, *held*, that the sum of Rs. 2,676 paid by the lessee was not a deposit in the legal sense of the term, that the principle of the decisions with reference to a deposit in the legal sense of the term, *viz*, that, on repudiation of the contract by the payer, the amount should be forfeited to the payee, was inapplicable to the case, and that the lessee was entitled to the amount in question.

The sum of Rs 2,676 was paid in part-payment of the rent and not also as security or guarantee for the performance of the contract.

Nature of a deposit in the legal sense of the term and law as to forfeiture of a deposit in the legal sense of the term discussed.

Appeal against the order of the District Court of Tinnevelly, dated 17th August, 1926, in Appeal No. 196 of 1925, preferred against the order of the Court of the Subordinate Judge of Tinnevelly, dated 11th December, 1924, in O.S. No. 85 of 1924.

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*A.A.O. No. 366 of 1926. 5th July, 1929.

Varadaraja Perumal Koil, Melaviraraghavapuram v. Munappa Pillai.

Venkatasubba Rao, J.

K. V. Sesha Aiyangar for appellants.

T. S. Venkatesa Aiyar and *K. Balasubramania Aiyar* for respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.—This appeal raises an important question of law, relating to the right of a party in default, to the recovery of the deposit paid by him under a contract. The suit is filed by a lessee for the return of his deposit and the Trial Court rejected the claim holding that the amount became forfeited to the lessor. The Lower Appellate Court took a different view and remanded the case for retrial and disposal. The question is, was the order of remand rightly made? The District Judge's decision remanding the suit is contained in the following passage of his judgment:

> "The landlord's loss in re-letting was alleged and put in issue but not tried. I think that the landlord is entitled to have the question decided what damages he suffered by reason of plaintiff's default and that he is entitled to deduct from this deposit whatever amount is found due to him as damages."

We have first to examine the terms of the lease deed. It bears the date the 15th of April, 1920. The period of the lease was fixed as seven years and the lessee took possession. The lease was of agricultural land. The annual rent was agreed to be Rs. 3,210, to be paid in two instalments, a moiety before the 30th December and the remaining half before the 30th June of each year. Some further rent was to be paid in kind with which we are not concerned. The deed contains a provision for re-entry, it being stipulated that in default of payment of rent, the landlord is to be at liberty to re-enter and take possession not only of the land but also of any crops standing upon it. The lessee paid a deposit of Rs. 2,676 and the clauses that follow are very material. He is entitled to interest on that sum at 6 per cent. per annum and may adjust that interest against the rent payable on the 30th June of each year. Then as regards the principal of the deposit amount, it was to be adjusted against the rent payable for the last, that is the seventh year of the lease.

The lessee made default in the payment of rent that fell due on the 30th June, 1921. The lessor made a demand for the rent which was not complied with. He immediately exercised his right of re-entry and took possession of the land with the standing crops thereon. The lessee made some ineffectual protest, not in regard to the re-entry but in respect of certain subsidiary matters. With that protest, we are not concerned in this appeal.

The question to be decided is, is the lessee entitled to the return of his deposit, less the rent, that became payable on the 30th June, 1921? We may observe that the claim is confined to this amount. Mr. Sesha Aiyangar, the learned Advocate for the appellant (the lessor) has drawn our attention to several English and Indian decisions on the point. The first question that arises is, is the amount claimed in this suit a deposit in the legal sense? What is strictly known as a deposit must possess a twofold character. It must first be a part payment and next it must be of the nature of money "staked." That a "deposit" must possess these two distinctive marks is emphasised in the leading case on this subject, *Howe* v. *Smith*.[1] This case has been referred to and followed in numerous Indian decisions including *Natesa Aiyar* v. *Appavu Padayachi*.[2] The very word "staked" is used in the judgment of Bowen, L.J., who observes:

> "In the present case we have in the first place, turning to the language of the instrument, a description of the manner in which the money is staked or deposited. It is a deposit, and it is to be *both a deposit and in the nature of part payment*."

The force of the word "staked" is brought out in the judgment of Fry, L.J., wherein it is stated:

> "It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates *by the fear of its forfeiture* a motive in the payer to perform the rest of the contract."

A deposit then serves not merely as a part payment but there is a further characteristic which it possesses, namely, it is paid as a "guarantee that the contract shall be performed," in other words, as "a security for the completion of the purchase.". (*See* the judgments of Cotton, L.J. and Bowen, L.J.) This dual nature of what is known as deposit is most tersely referred to by Cotton, L.J., thus:

> "If the sale goes on, ... it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, ... he can have no right to recover the deposit."

The same idea is conveyed by the judgment of Fry, L.J. After stating that a deposit corresponds to "the earnest or *arrha* of our earlier writers'' the learned Lord Justice goes on to say:

> "The expression used in the present contract that the money is paid 'as a deposit and in part payment of the purchase money,' relates to the two alternatives, and declares that in the event of the purchaser making default

1. (1884) 27 Ch. D. 89.
2. (1913) I.L.R. 38 M. 178: 24 M.L.J. 488 (F.B.)

Varadaraja Perumal Koil Melavira-raghava-puram v. Muniappa Pillai.

Venkatasubba Rao, J.

the money is to be forfeited, and that in the event of the purchase being completed the sum is to be taken in part payment."

This definition of the word "deposit" receives further support from the judgment of Lord Dunedin in *Sprague* v. *Booth.*[3] After referring with approval to *Howe* v. *Smith*[1] the learned Lord observes:

"If payment is made of the purchase money, it is to be credited to such payment; if default is made in the payment of the money, then the deposit is forfeited."

We have now clearly shown that a sum paid under a contract cannot be called a deposit unless it fulfils these two requirements. This being then the nature and incidents of a deposit, can it be said that the money paid under the contract in question answers that description? In our opinion, the answer must be in the negative. In the first place there is a broad distinction between an executory contract of sale and an *executed* contract of lease. In the former case, a deposit amount is paid in order to create "by the fear of its forfeiture a motive in the payer to perform the rest of the contract." In the case of a lease partially performed, the matter stands on a different footing. This very contract illustrates what we mean. The parties did not contemplate either by express terms or by implication that the money was to be forfeited. The lease deed contains express stipulations on the point. It says that the interest on the deposit was to be adjusted against the moiety of the rent due on each 30th of June and the principal itself was to be deducted from the rent for the last year of the lease. There was not the remotest idea that the amount was ever to be forfeited. The sum was therefore paid in part payment of the rent, but not in addition as security or guarantee for the performance of the contract. The second requisite is therefore wanting and we are not prepared to hold that the sum in question can be treated as a deposit in law.

The cases quoted by Mr. Sesha Aiyangar do not apply; for, in each of them the lease contains an express forfeiture clause: *Orr* v. *Chinna Yegappa Chetty,*[4] *Venkatachari* v. *Ramalinga Tevan*[5] and *The President, Vellore Taluk Board* v. *Gopalasami Naidu.*[6]

Mr. Sesha Aiyangar contends that even in the absence of a forfeiture clause the deposit amount becomes liable to be for-

1. (1884) 27 Ch. D 89. 3. (1909) A.C. 576
4. (1915) 17 M.L.J. 229. 5 (1917) 7 L.W. 404.
6. (1914) I.L.R. 38 M. 801 (F.B.).

Varadaraja Perumal Koil, Melavira-raghava-puram v. Munlappa Pillai.

Venkatasubba Rao, J.

feited. He relies upon *Howe* v. *Smith*,[1] the case already cited, *Hall* v. *Burnell*[7] and *Ex parte Barrell. In re Parnell*[8]. The law on the point may be thus shortly stated. In each case, we have to look to the document to see what was the bargain that was made. The parties may agree just as they please as to what is to be done with the money deposited. In the absence of an express clause, the term most naturally to be implied, having regard to the nature and incidents of a deposit, is that on repudiation of the contract by the payer, the amount shall be forfeited to the payee. (See *Howe* v. *Smith*,[1] the judgment of Fry, L.J., at page 101.)

In the present case we have held that the amount paid under the contract is not a deposit and the principle above stated does not therefore apply.

There was some discussion whether on the facts the lessee's conduct amounts merely to a breach or constitutes a repudiation of the contract. In the view we have taken, it is unnecessary to deal with this question.

To avoid any misunderstanding, it remains to observe that the respondent's learned Advocate confines his claim to the amount, the subject-matter of the appeal in the Lower Appellate Court.

The appeal fails and is dismissed with costs.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

C. Ahamad Haji .. *Appellant** (*Deft.*)

v.

Mayan and others .. *Respondents* (*Plffs.*).

Ahamad Haji v. Mayan.

Limitation Act (IX of 1908), S. 19—Admission that properties were owned by another and demised on kanom to him—If implies that the kanom is subsisting—Suit for redemption of mortgage—Allegation that the original mortgage-deed is lost—Finding of Court upholding the fact of mortgage—Necessity of plaintiff to prove the terms of the mortgage—Civil Procedure Code, O. 41, R. 4—Suit for redemption of mortgage—Dismissal by Trial

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*C.M.A. No 431 of 1927 23rd July, 1929.

1. (1884) 27 Ch. D. 89. 7. (1911) 2 Ch. 551.

8. (1875) 10 Ch. A. 512.

Ahamad Haji v. Mayan.

Court—Reversal of this decree and granting decree for redemption by Appellate Court—Appeal by an alienee of some of the items from the mortgagee—Allowing of this appeal and confirmation of the Trial Court decree—Power of the Court to reverse the decree of the Lower Appellate Court in favour of the alienees of other items who have not appealed.

An admission by a person that the properties were owned by another and were demised to his family on kanom necessarily implies that he acknowledges that the kanom is subsisting at that date, in other words, that the kanom is liable to be redeemed.

Dip Singh v. *Girand Singh*, (1903) I.L.R. 26 All. 313 relied on.

The fact that the plaintiff in a suit for redemption of a mortgage alleges that the original mortgage-deed is lost and the Court comes to the conclusion that there was in fact a mortgage in favour of the defendant does not relieve the plaintiff from the necessity of proving the terms of the mortgage set up by him.

Where a suit for redemption of a mortgage was dismissed by the Trial Court but the Appellate Court reversed this decree and granted a decree for redemption and an alienee of some of the items comprised in the mortgage from the mortgagee preferred an appeal against the decree for redemption and the Court held in this appeal that the decision of the Trial Court that the mortgage was not proved was correct and should be confirmed,

Held, that it was open to the Court under O. 41, R. 4 of the Civil Procedure Code to reverse the decree for redemption granted by the Lower Appellate Court not only against the alienee who had actually preferred the appeal but also against the alienees of the other items who had not preferred the appeal.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal No. 214 of 1927 (A.S. No. 443 of 1926, District Court) preferred against the decree of the Court of the District Munsif of Parappanangady in O.S. No. 322 of 1924.

K. Kuttikrishna Menon for appellant.

P. Govinda Menon for respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This is a suit for redemption of a kanom alleged to have been made in 1856. It is in its turn said to be a renewal of kanoms of still earlier dates. The plaintiffs claim redemption having obtained a melcharth or second mortgage from a Devaswom said to be the original owner of the properties in question. Their case is that the Devaswom mortgaged those properties to a certain Naduvakat tarwad to secure 2,650 fanams and that the annual purapad is 15 paras of paddy. The defendants 1 to 5 and 19 are members of the aforesaid tarwad and represent the original mortgagee. The 6th defendant who is the appellant is in possession of some items and claims an interest by virtue of some deeds executed in his favour by certain members of the same tarwad.

Ahamad Haji v. Mayan.

Venkatasubba Rao, J.

The plaintiffs seek to prove the mortgage by a copy (Ex. A) of the original kychit executed in their favour. Their case is, that the document was filed in a case and the records in that suit including the original kychit were destroyed during the Moplah rebellion. The District Munsif came to the conclusion that the copy produced is a fabrication and on that ground dismissed the suit.

He has, however, held that it has been proved that the Devaswom is the owner of the properties and that they were demised on kanom to the predecessor-in-interest of defendants 1 to 5 and 19. In coming to this conclusion he acted upon two exhibits *S* and *W* of the years 1881 and 1893. In those deeds the executants, some members of the tarwad, admitted that the Devaswom was the owner and that the properties were demised to their family on kanom. The District Munsif was justified, on these admissions, in finding that the plaintiffs Devaswom was at one time the owner of the property. But he observes that these admissions by themselves cannot avail the plaintiffs, for it is their duty to show that a kanom answering to the mortgage alleged in the plaint was created, and, secondly, that it was subsisting on the date of the suit. Let us now take the second point first. Under section 19 of the Limitation Act, an acknowledgment to be effective must be made before the period of limitation has expired. True, but it is necessarily implied in the admission we have referred to, that the mortgagee acknowledges that the mortgage was then subsisting; in other words, that it was liable to be redeemed. This is the plain effect of the admissions and we are supported in this view by *Dip Singh* v. *Girand Singh*.[1] On this point, therefore, we do not agree with the District Munsif, but this does not dispose of the case. It is not sufficient for the plaintiffs to show that there is a subsisting mortgage. It is their duty to prove further the terms of that mortgage and the case with which they came to Court having been disbelieved by the District Munsif, we must hold that they have failed to prove the terms.

An appeal was taken to the Subordinate Judge and he has held that Ex. A has been satisfactorily proved. If the question is one of fact, we should certainly refuse to disturb his finding, for our powers, though this is in form a Civil Miscellaneous Appeal, are substantially those of a Second Appellate Court. In reversing the Munsif's finding, the Subordinate Judge has given effect to a wrong presumption. What he says

1. (1903) I.L.R. 26 A. 313 at 316.

Ahamad Haji v. Mayan.
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Venkatasubba Rao, J.

in effect is this: If you find that the plaintiffs have a title, if it further appears that there was a mortgage in favour of the defendants, it is for the latter to disprove the terms of the contract as spoken to by the plaintiffs. In other words, the plaintiffs have only to allege that the original instrument is lost and if the Court comes to the conclusion that there was a mortgage, the plaintiffs are relieved from the duty of affirmatively making out the terms of the contract, because it is said, the Court may presume that any contract which they set up is true. This is, in our opinion, quite a wrong presumption and the judgment of the Lower Court, vitiated by this error, cannot be supported.

Applying this presumption, the Subordinate Judge first records a finding in these words:

> "It appears to me that there is not sufficient evidence to hold that Ex. A is not a true copy of a kychit that was executed in favour of the Devaswom."

A little lower down he states his conclusion in words very positive and remarks:

> "My finding on issue 2 is that the kychit sued on is genuine and that the properties are held under it."

The learned District Judge overlooks the apparent contradiction between these two passages.

We have had to reject his finding for this reason and the question is, what is the course we are now to adopt. Under S. 103, Civil Procedure Code, we have ourselves examined the evidence and come to the conclusion that the Munsif has recorded a correct finding. The plaintiffs have made no attempt to prove the case with which they came to Court, namely, that the purapad was being paid till 1924. This, in our opinion, confirms the view of the Munsif and in the result we allow the appeal, set aside the order of remand and confirm the decree of the District Munsif.

This case having been posted to be spoken to

The Court made the following

ORDER.—The 6th defendant alone has filed this appeal. But under O. 41, R. 4, Civil Procedure Code, defendants 12 to 17 (respondents 4 to 9) are entitled to the benefit of our judgment. The decree of the District Munsif in favour of the 6th defendant and defendants 12 to 17 is restored. The result is, the appeal is allowed with costs of the appellant in this and the Lower Appellate Court.

N.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Parinam Rama Rao Pantulu and another .. *Appellants** (*Respondents*)

v.

Parinam Kristnamma .. *Respondent* (*Petitioner*).

Parinam Rama Rao Pantulu v. Parinam Kristnamma

Married Women's Property Amendment Act (*XIII of* 1923), *S.* 2—*Effect of—Insurance policy effected before* 31*st December,* 1913—*Applicability of S.* 6 *of the old Act of* 1874.

Section 2 of the Married Women's Property Amendment Act of 1923 does not enact that the provisions of section 6 of the old Act of 1874 shall not apply to insurance policies effected before the 31st December, 1913 and, consequently, an insurance policy effected in 1894 is governed by the old Act of 1874 and the decision of the Full Bench in *Balamba* v. *Krishnayya,* (1913) I.L.R. 37 Mad. 483: 25 M.L.J. 65 (F.B.) applies to such a case.

Appeal against the order, dated 16th February, 1927, of the District Court of Ganjam in O.P. No. 45 of 1926.

V. Govindarajachari for appellants.

B. Jagannadha Doss for respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The short question in this appeal is this: Has section 2 of Act XIII of 1923 the effect of rescinding *Balamba* v. *Krishnayya*[1]? The District Judge is of course wrong in saying that it was not open to the legislature to give effect to a view different from that taken in that decision. But the question is, what is the true construction of section 2? It declares that the provisions of section 6 of the Married Women's Property Act of 1874 shall apply in the case of any policy effected by any Hindu in Madras after the 31st December, 1913 (the Full Bench decision having been given on the 19th December). It does not further enact that they shall not apply to policies effected before that date. What then about such policies? They are clearly governed by the old Act. The present policy was effected in 1894 and governed as it is by the earlier Act, the decision of the Full

*A. A. O. No. 333 of 1927 and L. P. A. No. 288 of 1927 — 24th July, 1929.

1 (1913) I.L.R. 37 M. 483: 25 M.L.J. 65 (F.B.).

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Bench applies. We therefore confirm the judgment of the Lower Court and dismiss the appeal with costs.

The Letters Patent Appeal is dismissed without costs.

N.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD CARSON, LORD BLANESBURGH AND SIR LANCELOT SANDERSON.

Joydurga Dasi .. *Appellant**

v.

Saroj Ranjan Sinha and others .. *Respondents.*

P. C. — Joydurga Dasi v. Saroj Ranjan Sinha.

*Hindu Law—Will—Daughters—Bequest to—Estate conveyed—Absolute estate—Life estate with right of survivorship as regards predeceased daughter's share—Test—Will—Construction of—Circumstances of testator referred to in will and surrounding him at its date—Consideration of—Necessity—Clause of will—Construction of—Reference to other relevant provisions of will—Necessity—T. P. Act, S. 6 (e)—Expectancy—Transfer of—*Jus accrescendi*—Operation of—Interest to which a person would become entitled by—Transfer of, before right accrues—Validity—Privy Council appeal—New point—Permissibility*

The will of a Hindu provided, by clause 2: "After my death my said two daughters shall be my lawful heirs, and they alone shall in equal shares become owners of all my properties subject to the provisions of this will; the (said) two daughters shall acquire all manner of rights consistent with Hindu Law, in the properties that shall be left by me. God forbid, if my death takes place after the marriage of one daughter and before the marriage of another, then the unmarried daughter shall not be entitled to claim the entire property by virtue of her not being given in marriage, nor shall she get the same; even if such a circumstance should happen, both the daughters shall inherit in equal shares. The daughters and their sons, that is to say, my heirs, shall enjoy the properties, etc, so long as they shall live in this house at Boalmari. Nobody shall ever by fixing the abode at any other place than this be entitled to own or enjoy the property None shall be competent to succeed to the property who may go to live elsewhere. Nobody shall at any time be competent to remove the Sadar Cutchery at Balidanga to any other place, the Sadar Cutchery shall always remain there. Such is the injunction also from my ancestors".

In other clauses of the will, notably in clauses 3, 5 and 6 the word "heirs" was used to denote not the daughters only, but those daughters and their sons.

Again, when referring in terms only to the testator's daughters, the will fettered their powers over the property Clause 7 provided that if

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*P.C. Appeal No. 132 of 1927. 11th June, 1929.

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either of the daughters, elder or younger, desired to have a partition of the property effected, she should not be competent to do so. Clause 8 was as follows: "When the daughters shall attain majority, the executors shall make over to their satisfaction the properties, etc, and everything, if they decline to accept the properties, etc, into their own hands as being incapable, the executors shall when the daughters' sons attain majority, retire after making over everything to them to their satisfaction."

Held that, on the true construction of the will, the only interest thereby given to the testator's daughters respectively in his property was the interest of a daughter as recognised by the Hindu Law, and not an absolute interest.

A power to alienate is an essential incident of an absolute interest in property Not only is no such power in terms conferred upon the daughters, but the prohibition against partition by them and the provision of clause 8 for the benefit of their sons indicate clearly that the whole scheme of the will is that the property shall remain intact after the death of both daughters for the benefit of their sons as the heirs of the testator.

Held further that, under the will, after the death of one of the daughters, the survivor would by virtue of the *jus accrescendi* be entitled for the remainder of her life to the enjoyment of her sister's moiety as well as of her own

Quaere: Whether an arrangement between two daughters, legatees under their father's will, by which each daughter gives up in favour of the sons of the other the interest to which she would, under the will, be entitled by the operation of the *jus accrescendi* in the moiety given to her sister in the event of her sister predeceasing her, would be void on the ground that it is a transfer of a mere expectancy.

Their Lordships were not impressed with the contention that it would be.

To find out the effect of a clause in a will, that clause must be read in connection with other relevant provisions of the will.

The circumstances of the testator referred to in his will and surrounding him at its date, are not irrelevant upon the question of construction of the will.

A point which suggested considerations of far-reaching importance was not allowed to be raised before the Privy Council for the first time on the ground that on such a point the Board would desire to have the benefit of the opinion of the Courts in India.

Appeal from the decree of the High Court of Judicature at Fort William in Bengal.

De Gruyther, K.C. and *Dube* for appellant.

Dunne, K.C. and *Parikh* for respondents.

11th June, 1929. The judgment of their Lordships was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—Two questions were discussed at the hearing of this appeal. The first was whether the appellant is not entitled under the will of her father to an absolute interest in a moiety of his estate. The second was whether, if under the will the interest taken by her must be limited to that of a Hindu daughter only—as is the contention of the respondents—she is not in the events which have happened, and not-

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withstanding an ekrarnama entered into on the 17th April, 1909, between herself and her sister, since deceased, entitled for the rest of her life to the remaining moiety of their father's estate, bequeathed in the first instance to her sister and now in the enjoyment of the respondents, the sons of that sister.

In the Courts in India further questions were raised by the appellant. These were decided against her and were not again ventilated at their Lordships' Board. There, the only questions discussed were those just stated—the second of them, in the form presented to the Board, being, as it seems, raised for the first time. But of this later.

The circumstances of the appellant's father referred to in his will and surrounding him at its date, are not irrelevant upon the question of construction which the appellant raises in the suit.

The testator, Mathura Mohan Pal by name, was, when he made his will, on the 12th October, 1884, an old man. He was, as he put it, in a declining state of physical strength. He had no expectation of any addition to his family. He had been twice married but was a widower. No issue of his first marriage survived. By his second wife he had two daughters, the appellant and Sarat Kumari, her younger sister. Their mother had died in 1881. In 1884 they were both infants and were still unmarried. But the appellant had attained marriageable age, and the testator was, as he expressed it, trying to get her married soon, and had made up his mind after she was married to keep his son-in-law in his family. These matters are detailed by him as an exordium to his will, and, coupled with the provisions expressly confirmatory of that impression contained in the dispositive clause set forth later, indicate that at least one main purpose of his in making a will at all, if not, indeed, his only purpose, was the limited one of protecting the appellant against the danger of being deprived of any interest in his estate should she, alone of his two daughters, be married before his own decease.

That event did not, however, happen. Within three months of making his will the testator was dead. Both of his daughters remained still unmarried. The testator's expectation had not been realised. Subsequently each of the daughters found husbands, whom each in turn survived. The appellant remains a widow with one son. Her sister Sarat Kumari, also a widow, died on the 12th June, 1914. The respondents are her three sons.

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In her lifetime, the ekrarnama above referred to was entered into between the two sisters. According to the respondents' contention it was effective to dispose in their favour during the life of the appellant of the moiety of the testator's estate appurtaining to their deceased mother, and their contention further is that under the testator's will the interest taken whether by the appellant or by their mother Sarat Kumari was the interest of a Hindu daughter only.

To defeat this contention the present suit was launched by the appellant. By her plaint she claimed the alternative relief already indicated. The suit has been dismissed by both Courts before which it has come—by the Subordinate Judge of Kishnagar, and on appeal by the High Court of Judicature at Fort William in Bengal. It is from the judgment and decree of that Court, dated the 19th November, 1925, that the present appeal is brought.

The clause of the will upon which is rested the appellant's claim to a declaration of an absolute interest is, according to the translation favoured by her, as follows:

"After my death my said two daughters shall be my lawful heirs, and they alone shall in equal shares become owners of all my properties subject to the provisions of this Will; the (said) two daughters shall acquire all manner of rights consistent with Hindu Law, in the properties that shall be left by me God forbid, if my death takes place after the marriage of one daughter and before the marriage of another, then the unmarried daughter shall not be entitled to claim the entire property by virtue of her not being given in marriage, nor shall she get the same; even if such a circumstance should happen, both the daughters shall inherit in equal shares The daughters and their sons, that is to say my heirs, shall enjoy the properties, etc, so long as they shall live in this house at Boalmari Nobody shall ever by fixing the abode at any other place than this be entitled to own or enjoy the property None shall be competent to succeed to the property who may go to live elsewhere. Nobody shall at any time be competent to remove the Sadar Cutchery at Balidanga to any other place, the Sadar Cutchery shall always remain there Such is the injunction also from my ancestors."

Now in order to reach a final conclusion as to the true effect of this clause it should of course be read in its context already referred to, and in association also with one or two further provisions of the will to which reference must later on be made. But even by itself and in the translation favoured by the appellant their Lordships are of the opinion that the only interest thereby given to his daughters respectively in the property of the testator is the interest of a daughter as recognised by the Hindu Law. Their ownership is to be ownership which in relation to daughters is consistent with that law. Even more clearly does this conclusion emerge if reference be had to the

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translation of the clause made by the Court translator and included in the paper book under the Registrar's order. Its introductory words, as so translated, are as follows:

> "On my death these two daughters of mine are my heirs according to the Shastras It is they who shall be entitled to all my properties in equal shares under the provisions of this Will. The two daughters shall get such rights as are enjoined by the Hindu Shastras to the properties (to be) left by me."

So much, even on a general perusal of the words. But if the clause be more critically examined and if it be read, as already indicated it should be, in connection with other relevant provisions of the will, the conclusion that the interest taken by each of the testator's daughters thereunder is one which determines with her death becomes irresistible.

It will, first of all, be noted that in the clause itself not the daughters only, but these daughters and their sons—the latter, of course, not then in being—are referred to as the testator's "heirs," and in other clauses of the will, notably in clauses 3, 5 and 6, that word is used in the same comprehensive sense.

Notable again, as if by way of contrast, is the manner in which the testator when referring in terms only to his daughters fetters their powers over the property. Clause 7 provides that if either of the daughters, elder or younger, desires to have a partition of the property effected she shall not be competent to do so. Clause 8 again is a striking confirmation of the conclusion that the interest conferred by clause 2 is a limited one only.

> "When the daughters shall attain majority, the executors shall make over to their satisfaction the properties, etc, and everything, if they decline to accept the properties, etc, into their own hands as being incapable, the executors shall when the daughters' sons attain majority, retire after making over everything to them to their satisfaction"

Again, a power to alienate is an essential incident of an absolute interest in property. And not only is no such power in terms conferred upon the daughters, but the prohibition against partition by them and the provision of clause 8 for the benefit of their sons indicate clearly, as their Lordships think, that the whole scheme of the will—as might have been expected from its exordium—is that the property shall remain intact after the death of both daughters for the benefit of their sons as the heirs of the testator. Accordingly the Board, in agreement with both Courts in India, is of opinion that the appellant is not entitled to the declaration of absolute ownership which she seeks.

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But the testator's will as their Lordships read it would, after the death of Sarat Kumari, have left the appellant for the remainder of her life by virtue of the *jus accrescendi* in enjoyment of her sister's moiety as well as of her own, and it remains to be determined by way of answer to the second question raised by the appeal how far this position has been altered by the ekramama of the 17th April, 1909, to which reference has already been made.

The effect of that document so far as construction is concerned is as it seems to their Lordships too clear for argument. At its date, as above appears, and as is stated therein, one sister had one son and the other sister had three sons. Each was apprehensive that on the death of one of them there would be during the life-time of the other disputes arising between the son or sons of the deceased sister on the one hand and the surviving sister on the other. The ekramama accordingly provides that if one of the sisters should die the son or sons of the predeceased should so long as the other sister lives remain owners in possession in the same manner as his or their mother had been of the one half share of the movable and immovable property left her by her father. On the death of the surviving sister the sons of both are to have such right and share as they are entitled to get under the testator's will.

It is under this ekramama that the respondents claim to remain in possession of their mother's moiety of the estate. That its provisions are apt to give them the right they claim was hardly contested before their Lordships. But it was contended that the ekramama was not binding upon the appellant at all: it was, in the event which had happened, no more than a grant in favour of the respondents, and while still a mere expectancy, of the interest in Sarat Kumari's moiety to which, under the will the appellant, by the operation of the *jus accrescendi,* might become entitled on her sister's death in her own life-time: it was accordingly void on the principle enunciated in the decisions of the Board in *Harnath Kuar* v. *Indar Bahadur Singh*[1] and *Annada Mohan Roy* v. *Gour Mohan Mullick*,[2] with reference to the attempted disposition of his expectancy by a presumptive reversioner during the lifetime of a Hindu widow.

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1. (1922) L R. 50 I A. 69 I.L R. 45 A 179 44 M.L.J. 489 (P C.)
2 (1923) L R. 50 I.A 239: I.L.R. 50 C 929: 45 M.L.J. 617 (P.C.).

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Their Lordships were not impressed by this contention of the appellant in support of which, as was admitted, no authority could be found.

But they do not propose further to discuss it. It was raised before the Board for the first time. It suggests, if there be anything in it, considerations of far-reaching importance upon which the Board would desire to have the benefit of the opinion of the Courts in India. Accordingly, their Lordships do not entertain it at all. And to the ekrarnama no other objection was taken.

In the result, therefore, the appellant has failed to satisfy the Board that the judgment and decree appealed from were otherwise than correct. Their Lordships accordingly will humbly advise His Majesty that this appeal therefrom be dismissed and with costs.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *Stanley, Johnson & Allen.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Immani Seshayya and others .. *Appellants** (*Respondents-Defts.*).

v.

Dronamraju Lakshminarasimha Rao Pantulu (dead) and others .. *Respondents* (*Appellants and Respts. 4 to 6 in do. L.Rs. of the deceased 1st Respt., Plffs. and Defts. 5 to 7*).

Immani Seshayya
v.
Dronamraju Lakshminarasimha Rao Pantulu.

Mortgage—Lease—Test—Name given by parties to deed—Nature of deed if affected by—Word—"Cowle"—Meaning of—Use of word not conclusive of transaction being only a lease—Mortgagee in possession—Portion of profits undertaken by, to be paid to mortgagor but not so paid by him—Liability to appropriate towards mortgage debt—Transfer of Property Act, Ss 62 (a) and 76 (h)—Effect—Mortgage with possession for term—Debt due under, discharged within term—Liability of mortgagee for full profits of property after date of discharge and before demand for possession

Under two deeds (which evidenced one and the same transaction), dated 2nd May, 1865, a sum of Rs 2,200 was advanced to the borrower, who agreed to pay an equal sum as interest thereon. The lender was put in possession of certain lands belonging to the borrower, and, as between the parties, the annual profits were estimated to be Rs. 240. The lender was

*L P A. No. 12 of 1925. 21st January, 1929.

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required annually to pay Rs. 100 for the revenue and village expenses, appropriate Rs. 80 towards the mortgage debt and pay the balance of Rs. 60 to the debtor The deeds provided that after the debt was discharged in 55 years in the manner set forth, the creditor was to surrender possession of the land to the borrower. The deeds also provided that, if the lender failed to pay Rs. 60, he should be bound to relinquish a part of the land in proportion to that sum.

The right, title and interest of the borrower in the lands in question were sold in Court auction and were purchased by the plaintiff, and the sale in his favour was confirmed on 1st March, 1882. From and after that date the annual payment of Rs 60 was never made to him. Treating the transaction as a mortgage, the plaintiff filed a suit for redemption in 1915

Held, that the transaction evidenced by the deeds in question was a mortgage and not a lease.

The word "cowle" may be used for a lease but it may be used for other transactions also In deciding whether a transaction is a mortgage or a lease, the substance of the transaction must be looked at, and Courts ought not to be guided merely by the word, which the parties chose to use, in describing the instrument.

Held further, that the Rs. 60 a year, which the mortgagee had undertaken to pay to the original mortgagor, and which he had defaulted to pay to the plaintiff from and after the date of his purchase should be adjusted as it fell due against the mortgage debt and that the mortgagee was not entitled to say that the plaintiff's only remedy was to recover it separately, that is, otherwise than in connection with the mortgage transaction.

The sum of Rs 60 was by agreement of parties excluded from the usufruct for a specific purpose. On the purpose failing or on the term not being carried out, it reverted without any further act or agreement and became again rents and profits, and the mortgagee had no option but to apply it in reduction of the mortgage debt. Neither the fact that a term of 55 years was mentioned nor the special provision in the deeds entitling the mortgagor to recover a quarter of the property if the sum of Rs. 60 was not paid to him in any year affected the position and liability of the mortgagee in respect of the said sum of Rs. 60.

Held also that, although on the above principle the mortgage debt had been discharged before 1913, when the plaintiff first demanded possession, the mortgagee was not up to the date on which plaintiff first demanded possession liable for the full or actual profits of the property.

As the mortgagee's possession originated in the mortgage and remained in a sense that of a mortgagee until there was a demand for recovery from the mortgagor, the conventional income, which the parties had agreed between themselves should remain in force as the income of the property to save them the trouble of accounting, should be considered to remain in force until there was a demand for recovery. After that date the plaintiff was entitled to recover the full profits of the property until the date on which possession was given.

Mode of taking accounts pointed out.

Appeal under clause (15) of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss, dated 26th September, 1924 and passed in S.A. No. 1216 of 1921 preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Ellore in A.S. No. 255 of 1920

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(A.S. No. 271 of 1920, Sub-Court, Ellore) preferred against the decree of the Court of the Additional District Munsif of Tanuku in O.S. No. 294 of 1918.

G. Lakshmanna and *M. Appalacharya* for appellants.

S. Varadachariar, P. Somasundaram and *N. Rama Rao* for respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—This is a Letters Patent Appeal from the judgment of Mr. Justice Devadoss and raises an important question in regard to the effect of a certain transaction evidenced by two documents, dated the 2nd May, 1865. The two deeds may be treated as practically one and the purport of the arrangement is shortly this. A sum of Rs. 2,200 is advanced to the borrower, who agrees to pay an equal sum as interest thereon. The lender is put in possession of certain lands belonging to the borrower and as between the parties the annual profits are estimated to be Rs. 240. The lender is required annually to pay Rs. 100 for the revenue and village expenses, appropriate Rs. 80 towards the mortgage debt and pay the balance of Rs. 60 to the debtor. It is further provided that after the debt is discharged in 55 years in the manner set forth, the creditor is to surrender possession of the land to the borrower. The only remaining material clause is, that if the lender fails to pay Rs. 60, he shall be bound to relinquish a part of the land in proportion to that sum. It is evident that the term was fixed as 55 years, because at the rate of Rs. 80 it would take that period to discharge the total sum of Rs. 4,400. The right, title and interest of the borrower in the lands in question were sold in Court auction and the plaintiff having become the purchaser, the sale in his favour was confirmed on the 1st March, 1882. It is not denied that since then the annual payment of Rs. 60 was never made to him. I may observe, that it is alleged on behalf of the defence that notwithstanding the Court sale, the lender continued to pay Rs. 60 to the original debtor. But this is not material, as it is admitted that the lender had notice of the Court sale and the alleged payments may be therefore ignored. The plaintiff has treated the transaction as a mortgage and has filed the suit, from which this appeal arises, as one for redemption. The suit was filed in 1915. It was contended that it was premature as the term of 55 years would expire only in 1920. The District Munsif in whose Court it was filed disposed of the suit in 1919.

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The appeal to the Subordinate Judge was decided in 1921. On the expiry of the term, that is, in 1920, the defendant gave up possession of the land to the plaintiff. The question, therefore, whether the suit was premature or not, is not of much importance in so far as the action relates to the possession of the property.

The same point, however, arises in another form, when did the debt become discharged? For, not only does the plaintiff contend that his right to redeem accrued when the debt was paid off, irrespective of the period fixed, but he further urges that the defendant became liable from that moment to account for the profits from the lands. He contends, in short, that the debt became discharged long before the expiry of 55 years, the period fixed. He maintains that the defendant, who, contrary to the terms of the arrangement, retained in his hands the sum of Rs. 60 was bound to apply that sum in reduction of the mortgage debt. If that was done, the debt would, of course, have been discharged long before 1920. The question to decide is, was the defendant so bound?

The point to be first decided is, is the transaction a lease or a mortgage? For, on this will depend whether the plaintiff's contention can prevail or not.

"The only guiding rule that can be extracted from the cases on the subject is, that the intention of the parties must be looked into, and that when 'once you get a debt with the security of land for its repayment, then the arrangement is a mortgage by whatever name it is called'." *Ghose on Mortgages,* 5th Edition, Vol I, page 102.

Let us now examine the terms of this arrangement. The deed calls the advance a loan and provides for interest upon it. It refers to the discharge of the debt and prescribes a method by which it may be gradually paid off. The obvious intention of the deed is to treat the property as security for the amount advanced together with interest upon it. In the face of these provisions, can the sum advanced be regarded as a premium or bonus paid for the use of the land? Generally, where a lessee pays a premium to his lessor, the intention is not that it shall be repayable. Every recital in the deed in question shows that the parties intended that the money was to be repaid and that the land was to be treated as security for repayment. The fixing of a term is clearly not inconsistent with the transaction being a mortgage. Mr. Lakshmanna, for the defence, relies on the fact that the deed is described as a "cowle" and that the word means a lease. Assuming that he is right, we must still look at the substance of the transaction and not be guided

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merely by the word, which the parties chose to use, in describing the instrument. But, as a matter of fact, the treatises to which we have been referred show that the word "cowle" has a much wider signification and may mean "a contract" or "an agreement". There is then the further fact that the deed stipulates that in the event of the creditor failing to pay Rs. 60 the debtor may insist upon possession being given of a share of the land in proportion to that sum. Is it conceivable that if the parties intended the arrangement to be a lease, they would have provided that the lessee was in a certain event to deliver up a part of the property?

This leads me to the main question in the appeal. In the case of a mortgage with a period fixed, where the mode of repayment is prescribed, can the debt never and in no circumstances become discharged, before the expiry of that period? Mr. Lakshmanna has strongly contended that, in such a case, the clause fixing the term is an essential part of the contract and that the mortgagor must wait till the period comes to an end. Mr. Varadachari, for the plaintiff, concedes that in a case of this kind it is not open to the mortgagor to redeem the mortgage before the close of the period *by tendering the amount.* But, what he strongly urges is this, notwithstanding the period, *if the mortgagee gets into his hands, from the usufruct of the property,* a sum of money belonging to the mortgagor, it is the bounden duty of the former to apply that sum in reduction of the mortgage debt. According to Mr. Lakshmanna, the true principle is, that the mortgagee, while remaining liable for the sums received by him, is not bound to apply them in discharge of the mortgage debt: in other words, taking the present case, the debt could be discharged only in the manner provided in the deed and it could not be treated as paid off before the expiry of the full 55 years. The defendant's liability, Mr. Lakshmanna says, is merely to separately account for the sums retained in his hands contrary to the terms. In my opinion the sounder and the more equitable rule is that for which Mr. Varadachari contends.

Section 62 of the Transfer of Property Act runs thus:

"In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property,—

(*a*) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(*b*) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money—when the term, if any,

prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided."

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The present case is covered by clause (*a*). The words used are "when such money is paid." They mean in the context "when such money is paid from the rents and profits". The question to decide then is, when did the mortgage money become paid off? The clause in question does not say that a different rule is to be applied, when by the contract a term of years is fixed. On the contrary, it seems to embody the principle, that in no case can the mortgagee retain possession, after the debt itself is discharged from the usufruct. It is true that where a period is fixed as a material part of the contract, the mortgagor cannot be at liberty by any act of his own to get rid of the stipulation, that is to say, he cannot, at his will, curtail the period by tendering the money before the prescribed date. The case cited by Mr. Lakshmanna, such as *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Suriaharayana Raju Bahadur*[1] and *Aga Muhammadally Beg* v. *Chendragiri Venkatappayya*,[2] decide no more than this. What the law will prevent is if the mortgagor, before the prescribed period, seeks to discharge the debt in a manner not contemplated by the contract, that course he will not be permitted to adopt. But the question here arises in an entirely different form. A portion (Rs. 60) was by agreement of parties excluded from the usufruct for a specific purpose. If the purpose failed or the term was not carried out, what was the result? The part excluded reverted without any further act or agreement and became again profits. The mortgagee would then be liable to apply it in reduction of the debt. Section 76 (*h*) enacts that the mortgagee shall apply the usufruct, first in reduction of the interest, then of the principal. This, he is bound to do under the law; so that, if a part of the profits initially excluded was not applied as directed, it became usufruct as a matter of course and without a special contract to that effect. The proper way then of viewing the question, is: Has the part excluded, in the events that have happened, regained its character of rents and profits? If so, the mortgagee has no option but to appropriate it to the mortgage debt. *Jaijit Rai* v. *Gobind Tiwari*[3] is a very instructive case on the point and gives effect to the principle as I have stated it. *Brij Kumar Lal* v. *Majlis Sahai*[4] also supports the view I

1. (1880) I.L.R. 2 M. 314.
2. (1918) 35 M.L.J. 287.
3. (1884) I.L.R. 6 A. 303.
4. (1916) 34 I.C. 899.

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have taken. I cannot follow Mr. Lakshmanna's contention that S. 77 of the Transfer of Property Act supports him. In the first place, that section refers to a case where there is a contract, that the receipts from the property shall be taken in lieu of the interest and "defined portions of the principal". I doubt if the section applies to the present case at all. Mr. Lakshmanna says that out of the sum of Rs. 80 mentioned in the deed, we must allocate Rs. 40 to the principal and Rs. 40 to the interest. Granting we do so, how does that satisfy the term regarding "defined portions of the principal"? The relation is not constant; the ratios 40: 2,000 and 40: 1,960 and 40: 80 are not the same. In other words, the principal gets gradually reduced, whereas Rs. 40 is a constant figure. But assuming that this is not a sound objection, how does section 77 avail the defendant? All that it enacts is, that the rule of appropriation mentioned in section 76 (*h*) shall not in certain cases hold good. I am therefore of the opinion that the plaintiff's contention must prevail, namely, that the sum of Rs. 60 should be debited against the mortgage debt and the account taken accordingly. It is obvious that in that event the debt became wiped out long before 1920, that is, before the expiry of the period fixed.

That this is the correct principle will become apparent if an analogous case be considered. Let us suppose that the revenue on this land had been remitted by the Zamindar and the sum representing that revenue had annually been left in the hands of the defendant. Can it be successfully maintained that it is not a part of the usufruct, which the mortgagee was bound to adjust, against the mortgage debt? Clearly not. The same principle applies to the facts of the case.

Next, does the existence of the special clause, namely, that if the mortgagee fails to pay Rs. 60, he shall be bound to relinquish a proportionate part of the land, make any difference? In my opinion, it does not. The mortgagor was given an option and it was open to him not to avail himself of that term. Had the plaintiff elected to take advantage of this clause, he would have obtained possession of a part of the land and no further question would arise. Similarly, it was open to the mortgagor to have sued for the sum of Rs. 60 and the defendant could not in that event have pleaded that he applied the sum to reduce the mortgage debt. This, however, did not happen in this case and the mortgagor not having exercised his option in that way,

it is open to him now, to ask that the same shall be adjusted against the mortgage debt.

Lastly, in regard to this part of the case, Mr. Lakshmanna contended that what the plaintiff purchased at the Court auction did not include the mortgagor's right to the annual payment of Rs. 60. This is an unfounded contention and does not require serious notice.

I now turn to a contention relating to the revenue. It was urged for the plaintiff that the mortgagee failed to pay the beriz or revenue for 9 years from Faslis 1295 to 1303 and that the amount allocated in the deed for that purpose should also be calculated against the mortgage debt. This is a question of fact, but neither the District Munsif nor the Subordinate Judge has given a finding on the point. Under S. 103 of the Code of Civil Procedure we have ourselves examined the evidence and find it difficult to uphold the contention of the plaintiff. He alleges that the Zamindar sued him, as the defendant made default, that three suits were filed, that one was dismissed, two were decreed and that he thereupon paid the sums mentioned in the two decrees. Not only has he failed to produce the decrees, but it is admitted that they were passed for much larger amounts than the revenue payable for the lands in question. He asks us to assume without evidence *first*, that the defendant made default and *secondly*, that the suits filed were in respect of the cist which the latter was bound to pay. We cannot on the material before us record a finding in his favour. There was not a single demand made on the defendant for the return of the money. If the plaintiff paid what the defendant was bound to pay, why did he not send a demand for the amount from Fasli 1303 (1893) to 1915, the date of the suit? We must hold that the plaintiff has not made out this part of the case. Then remains the question, on what footing is the account to be rendered by the defendant? I have held that he was bound to adjust the sum of Rs. 60 retained in his hands from 1883 against the mortgage debt. In finding out when the mortgage debt became discharged, interest shall be calculated on each sum of Rs. 60 as it became payable, at 2 per cent. per annum (that is, slightly in excess of the contract rate, namely, 1 9|11 per cent.) After the mortgage debt is on this calculation found to be fully paid off, the defendant shall be liable annually for Rs. 140 (Rs. 240 less Rs. 100 payable for revenue, etc.) with 6 per cent. per annum to the year 1913. In the last mentioned year, the plaintiff called on the defendant to render an account;

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and from then, to the date of the delivery of possession (1920 or 1921), the defendant is liable to account on the basis of the actual profits received and not estimated rent, with 6 per cent. per annum. These are my directions in regard to the taking of accounts. In this connection I may observe that Mr. Varadachariar has contended that from the very date the debt has become paid off, he is entitled to hold the defendant accountable for actual profits received. I do not agree with this contention. Although the mortgage debt has become extinguished, the possession of the defendant cannot be said to be wrongful till he refused to surrender the land after demand was made. What has actually happened was not what at the outset was in the contemplation of the parties; but so long as the defendant's possession is not wrongful, I fail to see why the parties should not be held to be bound by the terms of the contract. The arrangement, as I have held, is a mortgage and not a lease, but it does not follow from that, that the defendant is liable to pay during the prescribed period of 55 years more than the estimated profits of the land. It was hinted in the course of the argument, that if an account was taken on the basis of actual profits, the figure might amount to some tens of thousands of rupees. I do not think, that either in law or in equity, that can be the measure of the defendant's liability, when it is borne in mind that his act was not wrongful. It must be further remembered that the original arrangement involves that the mortgagee shall get no higher interest than 1 9|11 per cent. per annum, an absurdly low rate. Having regard to all the circumstances, the most just and proper order seems to be what I have made.

The decree we pass is a preliminary decree. I direct the Lower Court to pass the final decree in the light of the observations and directions contained in this judgment.

Each party shall bear his costs of this Letters Patent Appeal.

Reilly J.

Reilly, J.—We have heard very long arguments in this case, but it appears to me that the main question for decision is a comparatively simple one. The terms of the documents, Exhibits A and B, have been explained in the judgment just delivered by my learned brother. It is not disputed that the Rs. 60 a year, which the defendants had to pay to the mortgagor, has not been paid to the plaintiff since he purchased the mortgagor's interest in Court-auction. Since this litigation started, possession has been given by the defendants to the

plaintiff, and we are told that that was done in 1920 or 1921. The main question before us therefore is whether the Rs. 60 a year, which the defendants and their predecessors had to pay to the original mortgagor, should be adjusted as it fell due against the mortgage-debt or must be recovered from the defendants by the plaintiff otherwise than in connection with the mortgage transactions.

Those transactions have been discussed during the main part of the argument before us as if they were mortgages, and I will deal with them first on that footing. The two mortgages represented by Exhibits A and B may be conveniently treated as one and the plaintiff be referred to as the mortgagor. I think it will be useful to look at the matter in the first instance as if there were no term of years mentioned in the mortgage documents, as if there was nothing said about 55 years, or about possession being surrendered at the end of the year Ananda or the year Siddarthi. The transaction would then be an usufructuary mortgage for Rs. 4,400, which was to be paid off by Rs. 80 a year out of the usufruct being applied to the reduction of that amount of Rs. 4,400, which represented both the principal and the interest, and Rs. 60 out of the usufruct was to be paid by the mortgagee to the mortgagor for his own purposes. If that were the agreement into which the parties entered and from the year 1882 the Rs. 60 was not paid to the mortgagor, what would be the position? Mr. Lakshmanna for the contesting defendants maintains that, although the mortgagee in those circumstances might have kept the Rs. 60 in his own hands instead of paying it over to the mortgagor, if the mortgagor wanted to recover the Rs. 60 for any year, he must do so quite apart from the mortgage transaction. But on what principle could a mortgagee in possession be heard to say that he had in his hands money belonging to the mortgagor, which he had received in his capacity as mortgagee out of the income of the mortgaged property in his possession but that he refused to adjust that against the mortgage-debt and that he would hold it until the mortgagor sued him for it in some proceedings unconnected with the mortgage. I do not think it is necessary in this connection to drag in the idea that in those circumstances the mortgagee would be trustee for the mortgagor in respect of the mortgagor's money which he kept in his hands, though no doubt he would be so It is enough, I think, to remember that the essence of a mortgage transaction is that the mortgage is security for the mortgage-debt. When the mortgagee has obtained payment of his debt, the security is done with: there is

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no purpose left in it. Let us suppose that we reach a stage where the mortgage-debt except Rs. 480 has been paid off by the application of Rs. 80 a year out of the income and at the same time by his failure to pay the Rs. 60 a year to the mortgagor the mortgagee has Rs. 480 out of the income from the mortgaged property in his hands. It appears to me almost absurd to suggest that in such circumstances the mortgagee could say "The mortgage-debt still remains to the extent of Rs. 480. I have got the mortgagor's money to that extent in my hands, but I intend to keep that entirely separate." It has been suggested that the mortgagee could do that, because he could have got the Rs. 60 a year in his hands not in accordance with the terms of the contract between the parties but in violation of the terms. Surely we cannot allow a party to plead his own wrong in that way. In my opinion it is clear on principle that, when the mortgagee has paid himself the mortgage-debt out of the mortgaged property in his possession, he cannot maintain that the mortgage is still in force. That principle is recognised in section 62 (*a*) of the Transfer of Property Act, and it was enforced in *Jaijit Rai* v. *Gobind Tiwari.*[3] That case is interesting because it enforced the principle in circumstances somewhat more marked than those of the present case. In that case, the income of the property was to be applied by the mortgagee to the payment of the interest on the mortgage-debt except a certain amount which he was to pay every year for the mortgagor's purposes. The principal of the mortgage-debt was to be paid by the mortgagor only in one lump sum. The mortgagees failed to apply the part of the income which he was bound under the contract to have applied to the mortgagor's purposes, and the Court held that that part of the income which was the mortgagor's money and which the mortgagee had kept in his hands instead of applying to the mortgagor's purposes must be adjusted against the principal of the mortgage-debt even though according to the contract the principal could only be paid off in one lump sum. If the proper principle is that the mortgagor's money which the mortgagee retained in his hands in that way must be applied to reduce the mortgage-debt even in such a case as that, much more it must be so applied in a case where there is no stipulation that the principal can be paid only in one lump sum but it is to be paid out of the income of the mortgaged property. The decision in *Jaijit Rai* v. *Gobind Tiwari*[3] has never been overruled, nor has dissent ever been expressed from it.

3 (1884) I.L.R. 6 A. 303.

Now does the fact that in this case a term of 55 years is mentioned make any difference in the application of this principle? We are not concerned in this case with any question of redemption, because in this transaction the mortgagor could never redeem by paying the balance of the mortgage-debt to the mortgagee; his right was only to recover possession when the mortgage-debt was satisfied. For myself I doubt whether in these documents, Exhibits A and B, any term of years in the strict sense was really intended. I doubt whether the meaning is more than that the Rs. 4,400 was to be paid off out of the income of the property at the rate of Rs. 80 a year and so would be cleared off in 55 years ending with Siddarthi. But, even if the mention of the term of 55 years ending with Siddarthi means more than that, how does it really affect the mortgagee's position in the circumstances that have arisen? If the amount of the mortgagor's money which the mortgagee retained in his hands has to be adjusted against the mortgage-debt, then at a time long before the expiry of the 55 years the mortgage-debt must have been satisfied. From that time, until the end of the 55 years, in what capacity would the mortgagee claim to remain in possession?—obviously not as a mortgagee to whom any part of the mortgage-debt was still due. I think the result of that is, that, if this transaction is a mortgage and nothing else, the Rs. 60 must clearly be adjusted as it fell due against the mortgage-debt until it was discharged and that the plaintiff must be held to have been entitled to recover possession from the date on which the debt was so discharged.

There appears to me to be only two ways in which the defendants could modify or get out of that result. If it were permissible, as it is not permissible, for them to represent that, although the parties entered in the documents Rs. 4,400 as the amount of the principal and interest and agreed that that should be paid off by taking Rs. 80 out of the income of the property which they took for purposes of the transaction at a conventional and fixed sum of Rs. 240 a year, they really knew that the income of the property would be much more than that, as indeed it is admitted before us, as it has turned out to be, and that they intended that the total of the mortgage-debt, principal and interest, should be more than Rs. 4,400, then they might be able to say that, even when the Rs. 60 had been adjusted as I have suggested, there would still be more due to them and that the debt had not really been discharged. But it is obviously not permissible for them to say in the face of the documents that the real transaction was for some larger amount than Rs. 4,400,

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that the real principal and interest together were something more than Rs. 4,400, though that would only include interest at the comparatively low rate of 2 per cent. If they cannot say that, then the only other way in which they can avoid the result indicated is by showing that this transaction was or included a lease. It cannot be contended and Mr. Lakshmanna has not seriously contended that the transaction did not include a mortgage. The very language of the documents precludes any such contention. But Mr. Lakshmanna has contended that here we have a mortgage which partakes of the nature of a lease. For myself I think that in this country that form of language is only likely to lead to confusion. We can have a transaction which is a mortgage and have a transaction which is a lease; we can have a transaction which is a mortgage and also a lease, as in the case of a Malabar kanom. But I do not think that in this country there is any real profit or use in speaking of a mortgage as partaking of the nature of a lease, as if we could have a mortgage with a tinge or flavour of a lease in it. What we have to find out is, whether the transaction included a lease. Mr. Lakshmanna has drawn attention to the fact that in Exhibit A the document is described as a cowle. "Cowle" is a word which may be used for a lease but may be used for other transactions. Mr. Lakshmanna has also pointed out that in the early part of Exhibit A there is mention of the rent of the property as being Rs. 240 a year. But nothing can be got from that, because that is only a statement showing the income which the mortgagor was getting when he was in possession. If we are to find that this transaction includes a lease, we must ask "Where is the rent?" Ordinarily there will be rent either paid in advance as a premium or reserved to be paid periodically. Now the Rs 4,400 cannot possibly be represented to be a premium, because it is described as a debt to be repaid Then, apart from that, the only amount which could be represented to be rent is the Rs. 60 a year to be paid to the mortgagor. That is not described as rent, and, when we remember the provision that, if the Rs 60 a year is not paid to the mortgagor, he may recover a quarter of the property and keep it in his possession, it is obvious that Rs. 60 also was not rent. If it were, we should get the curious result that the lessor might recover a quarter of the property from the lessee, if the rent was not paid, and then the lessee would be able to keep the whole of the remaining three-fourths in his possession without any rent being due from him. I think it is quite clear that this transaction does not include a lease. I may remark that, even if it were definitely called a lease,

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that would not be conclusive in the matter as is shown by *Brij Kumar Lal* v. *Majlis Sahai*[4] and other cases which deal with what are called zuripeshgi leases in Bengal.

Mr. Lakshmanna has also laid stress upon the special provision by which the mortgagor could recover a quarter of the property if the sum of Rs. 60 is not paid to him in any year, and he contended in one part of his argument that that was the only remedy which the mortgagor had if the Rs. 60 was not paid. I think it is quite clear that that provision only gave the mortgagor an option to recover a quarter of the property if he wished. That did not affect the position and liability of the mortgagee in respect of Rs. 60 if he did not pay it to the mortgagor and the mortgagor did not choose to exercise that option.

So far I have referred only to the Rs. 60 a year, which had to be paid to the mortgagor. Under Exhibit A, the mortgagor had also to pay Rs. 95 a year as kattubadi to the Zamindar. It is represented for the plaintiff that for several years more than 20 years ago the mortgagee did not pay that to the Zamindar and that he himself was forced by decrees of Court to pay it. That amount of kattubadi, which he had to pay, he wishes also to set off by adjustment against the mortgage-debt. It is clear that the mortgagor is not concerned with any kattubadi not paid by the mortgagee to the Zamindar unless he himself was forced to pay it or is still liable to pay it. He is certainly not still liable to pay anything to the Zamindar on that account for the years mentioned, and, if he wishes to recover by adjustment against the mortgage-debt any kattubadi by himself, he must prove that he had to pay it. He has not troubled to produce the decree under which he says he was forced to pay kattubadi for 6 years; and the only evidence which he has produced, Exhibit E series, though it shows that he had to pay certain amounts under decrees, larger than the amount of the kattubadi in the years concerned, does not show that it was the kattubadi on this land, with which we are concerned, that he had then to pay. I agree that he has not made out his case that he had to pay kattubadi to the Zamindar on this land.

I agree that Rs. 60 a year from the date of the plaintiff's purchase should be adjusted against the mortgage-debt with interest at 2 per cent. per annum as proposed by my learned brother. On the question how the account between the parties should be taken after the mortgage-debt is found to have been

4. (1916) 34 I C. 899.

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discharged in that way, I am not prepared to dissent from that view that it is only Rs. 240 a year *minus* the kattubadi and the village payment (making Rs. 100 a year in all) which should be credited to the plaintiff at 6 per cent. per annum until the date when he demanded possession. Mr. Varadachariar has contended that from the date when the mortgage-debt was discharged, the mortgagor is entitled to the full profits of the property (*minus* of course the kattubadi and the village payments) on the ground that, when the mortgage-debt was cleared off, the mortgage transaction had come to an end. As I have said, in one sense it is quite clear that the mortgage transaction had come to an end at that point of time. But it cannot be said that the relation between the mortgagor and mortgagee had entirely ended with that discharge or that the mortgage transaction left no result behind it. Certainly as there was no demand from the plaintiff for recovery of possession until 1913, it cannot be said that the mortgagee's possession from the date of discharge to 1913 was wrongful or that it was adverse to the mortgagor. And it is only in his position as mortgagor that the plaintiff has the longer period of 60 years under the law of limitation to recover possession. I think we can properly say, that, as the mortgagee's possession originated in the mortgage and remained in a sense that of a mortgagee until there was a demand for recovery from the mortgagor, the conventional income, which the parties had agreed between themselves, should remain in force as the income of the property to save them the trouble of accounting, should be considered to remain in force until there was a demand for recovery. After that date, of course, the plaintiff is entitled to recover the full profits of the property until the date on which possession was given. I agree therefore in all respects with the order proposed by my learned brother.

A.S.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE JACKSON.

In the matter of The Madras Native Permanent Fund Limited in Liquidation by Messrs. Fraser and Ross, Liquidators .. *Appellant**

v

T. S. Natesa Sastri and others .. *Respondents.*

The Madras Native Permanent Fund, Ltd. v. Natesa Sastri.

Companies Act, S. 55—Capital—Reduction of, without assent of Court—Articles having effect of—Validity of

Where some of the articles of a limited company enabled persons who had subscribed for shares of Rs. 100 to sever their connection with the com-

*O.S.A. No. 30 of 1928. 7th February, 1929.

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pany and end all their liability when they had paid up Rs. 84, *held* that the effect was a reduction of capital without the assent of the Court which was directly forbidden by the Indian Companies Act, and that the articles in question were *ultra vires* of the memorandum.

On appeal from the judgment of the Hon'ble Mr. Justice Waller, dated 20th January, 1928, and passed in the exercise of Ordinary Original Civil Jurisdiction in O.P. No. 75 of 1927 holding that the 357 persons mentioned in the Liquidators' list are not contributories within the meaning of the Indian Companies Act.

O. T. Govindan Nambiar instructed by *Messrs. King & Partridge* for appellant.

S. Duraiswami Aiyar, T. K. Rangaswami, K. B. Ranganatha Aiyar, T. P. Kalyanaraman, A. V. Seshayya, S. Rangachari and *K. Kuppuswami* for respondents.

The Court delivered the following

JUDGMENT.—This matter arises out of the liquidation of the Madras Native Permanent Fund Limited which is what is commonly called a Nidhi. The greatest difficulties arise when these funds are turned into Limited Companies, because their articles are usually drawn without regard either to the provisions of the Memorandum or to the general law embodied in the Companies Act. The effect of the articles relied upon in this case was shortly to enable persons who had subscribed for shares of Rs. 100 to sever their connection with the company and end all their liability when they had paid up Rs. 84. That appears to us not only to be *ultra vires* of the memorandum but to be a reduction of capital without the assent of the Court which is directly forbidden by the Indian Companies Act. That being so, it is clear that these 357 persons mentioned in the Liquidators' list should be declared to be contributories. Mr. S. Duraiswami Aiyar argued a wider ground before us, namely, that the debts which it was sought to make these persons liable to contribute to liquidate were debts themselves incurred *ultra vires* of the powers of the Fund. That may be right or wrong; but it is obvious that it is premature to discuss it at this stage. When these persons are called upon to contribute to the liquidation of definite debts, it will be open to them to argue that the debts which they are called upon to contribute to pay are *ultra vires* of the powers of the company, that is to say, are not in law debts at all. That must be dealt with on its merits as each case arises. It is not a matter with which we can deal now.

Costs as between attorney and client out of the estate.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE MADHAVAN NAIR.

Kottapalli Bapayya .. *Appellant** (*Petitioner*)

v.

Official Receiver of Guntur and others .. *Respondents* (*Official Receiver and Respondents*).

Kottapalli Bapayya *v.* Official Receiver, Guntur.

Provincial Insolvency Act (V of 1920), S 35—Insolvent whose debts have not been paid in full—Annulment of adjudication—Right to apply for—Complete and full discharge given by all creditors—Effect

Under S 35 of the Provincial Insolvency Act, an insolvent whose debts have not been paid in full is not entitled to apply for the annulment of his adjudication The fact that all the creditors give him a complete and full discharge will not entitle him to do so

Appeal against the order of the District Court of Guntur, dated 28th January, 1928 and made in O.P. No. 9 of 1927 in I.P. No. 3 of 1919.

B. Somayya for appellant.

N. Rama Rao for respondents.

The Court delivered the following

JUDGMENT.—The question is, does the case fall within section 35 of the Provincial Insolvency Act? The insolvent applied under that section for the annulment of his adjudication. The section runs thus:

"Where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication"

It is admitted by his counsel that the debts of the insolvent have not been paid in full, but it is stated that all the creditors gave him a complete and full discharge. That is not enough, for what the section contemplates is, payment of the debts in full. This is the effect of the numerous decisions on the point. In *Muhammad Ibrahim* v. *Ram Chandra*,[1] which we follow, the authorities are set forth and we do not propose to refer to them in any detail. The appeal fails and is dismissed with costs.

A.S.V. *Appeal dismissed.*

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*C.M.A. No. 45 of 1928. 3rd October, 1929

1 (1925) I.L.R. 48 A 272.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

P. A. L. Pl. Palaniappa Chettiar (died) and another .. *Appellants** (*Deft. and his Legal Representative*)

v.

V. N. S. Chockalingam Chetti .. *Respondent* (*Plff.*).

Palaniappa Chettiar *v.* Chockalingam Chetti.

Hindu Law—Inheritance—Custom in derogation of—Nature and proof of, required—Evidence of—Analogous customs if—Few instances recent and after date of suit if sufficient—Enlargement of custom by parity of reasoning—Permissibility—Nattukottai Chetties—Stridhanam of married daughter dying leaving a female issue who herself dies without issue—Reverter of, to parents of daughter—Custom of—Proof of

Where a custom is pleaded in derogation of Hindu Law that custom should be clearly defined and proved, so that, given the facts of the case, there will be no vagueness or obscurity as to the application of the custom.

A custom cannot be enlarged by any parity of reasoning. Customs may be similar or contradictory, probable or improbable, and the existence of one custom is no evidence of the existence of another The only proof of custom is the evidence of that custom and no other—evidence that given certain data certain results follow with the force of law.

Where the only evidence given was one definite instance and one vague instance of a very modern date and neither of them prior to the date of suit, *held* that that was inadequate to discharge the onus of proving a custom uniform, definite and specific and having the force of law.

Amongst Nattukottai Chetties there was admittedly a custom by which jewels, vessels and money presented to a girl by her parents at the time of her marriage become her stridhanam and there was also a custom by which, on the death of that married daughter without issue, that stridhanam reverted to the donors, her parents Plaintiff contended for a custom that that stridhanam reverted to the parents even when the woman had a female issue and that female issue herself died without issue.

Held, that the custom pleaded by the plaintiff could not be established by evidence of analogous customs, such, for instance, as the custom by which the stridhanam of a woman dying issueless reverted to her family, or the custom by which the stridhanam of a woman dying leaving a son who himself died without issue reverted to her family.

Held also that the evidence adduced was insufficient to establish the custom pleaded.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O.S. No. 100 of 1922.

K. S. Champagesa Aiyangar and *S. Singam Aiyangar* for appellants.

M. Patanjali Sastri and *K. Ramanathan Chettiar* for respondent.

The judgment of the Court was delivered by

Wallace, J.

Wallace, J.—The question for decision in this appeal is whether the plaintiff has proved the caste custom set up by him

*Appeal No 142 of 1925. 6th September, 1929.

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in derogation of the Hindu Law of inheritance. The plaintiff is of Nattukottai Chetti caste. It is a custom in that caste, when the daughter of a house is married, for her parents to present to her jewels, vessels and money which become her stridhanam. There is also a custom which has been recognised by this Court in A.S. No. 196 of 1923, that if that married daughter dies without issue, that stridhanam reverts to the donors, her parents. The plaintiff before us contends for a custom that that stridhanam reverts to the parents even when the woman has had a female issue and that female issue herself dies without issue. Under ordinary Hindu Law a female issue would on the death of the mother inherit her stridhanam holding a limited interest therein, and on her own death without issue it would revert to her father, the husband of the original donee. The plaintiff contends that there is in his caste a custom having the force of law which diverts the inheritance from the father to the family of the original donors of the stridhanam.

Now it is essential in a case where a custom is pleaded in derogation of Hindu Law that that custom should be clearly defined and proved; so that, given the facts of the case, there will be no vagueness or obscurity as to the application of the custom. The facts of the present case are, the plaintiff's sister, Minakshi, was married to the defendant in 1891; her parents gave her the usual stridhanam; she died in 1908 leaving one child, a daughter Visalakshi, who inherited her mother's stridhanam; she died in 1921 without issue. It may be noted also that at the time of her birth Visalakshi also received stridhanam presents from her maternal grandfather's family. Now the custom contended for in the plaint is that on the death of Visalakshi, both these stridhanams, the one given to her and the one given to her mother, belong to the plaintiff's family according to law and justice and according to the custom of the caste of both parties. The plaintiff asserts that the capital sum of both stridhanams has been left intact and has been accumulating interest; so that what was originally a sum of about Rs. 4,000 has now swelled to over Rs. 50,000 and the original claim was for that sum. If we confine ourselves to what is involved in the present appeal, which relates only to the stridhanam conferred on Minakshi, the amount originally stood at Rs. 1,672 has now swollen to Rs. 28,616 and it is that sum which the plaintiff now claims. The plaint was not clear as to whether custom demanded that each stridhanam should be kept intact from the moment of donation until reverter. It

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was claimed, however, in this case that both have been kept so intact and therefore were available.

It is of course settled law that the evidence of a custom pleaded to have the force of law must prove it to be continuous, uniform and specific. We have to examine the evidence to see if it satisfies that test.

It will be convenient here to dispose of a contention of the plaintiff that he could establish a custom by evidence of what he calls an analogous custom. He contends, for example, that the recognised custom by which the stridhanam of a woman dying issueless reverts to her family is analogous to the one now pleaded. He contends again that a custom, to which some of his witnesses speak, by which the stridhanam of a woman dying leaving a son who himself dies without issue reverts to her family, is an analogous custom. And he pleads that such analogous customs give, by considerations of common sense and parity of reasoning, a probability in favour of the custom alleged in the plaint. Such a contention seems to us inadmissible. Common sense and reasoning have nothing whatever to do with custom. As stated in *Arthur* v. *Bokenham*[1] quoted at page 326 of 37 Calcutta, it cannot be said that a custom is founded on reason, "for no reason, even the highest whatsoever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom." Customs may be similar or contradictory, probable or improbable, and the existence of one custom is no evidence for the existence of another. The only proof of custom is the evidence of that custom and no other—evidence that given certain data certain results follow with the force of law. It therefore appears to us that no evidence of analogous custom is relevant in proof of the plaint custom. This rules out the evidence of P.Ws. 4 and 6 for the plaintiff.

For the rest, P.W. 1's evidence is very vague. The only instance of the plaint custom to which he speaks is one which occurred two months before he gave his evidence in the house of M. M. P. L Palaniappa Chetti of Nemathanpatti. Now no one from that house has been examined. According to the witness also the stridhanam was repaid in that case by a hundi, but no hundi has been filed nor any accounts produced. P.W. 2 instances a case in his own family in which on the advice of

1. (1708) 11 Modern 148, 161.

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his elders he returned his wife's stridhanam and paid it by a hundi "one and a half years ago," that is just about the time when the present plaint was filed. That hundi is not filed. But what is more important, P.W. 2 does not say that the reverter was in response to his feeling that it was a matter of caste law. He says himself that he did not know what the caste rule was. None of those who advised him is examined. It may be noted that the custom he speaks of is not exactly that alleged in the plaint, since he does not speak of any reverter of stridhanam paid to his daughter. P.W. 3 only speaks of the plaint case and says that according to Chetti custom, the stridhanam—it is not clear if he is speaking only of Minakshi's stridhanam and not of Visalakshi's also—"belong" to the parents of the girl. He speaks of a correspondence about the matter but no letters are filed. P.W. 5 says vaguely that if a woman dies "leaving a son or daughter who also dies subsequently," that is, in every case, since every one dies, it will again revert to the parents of the woman. He does not say what happens when the woman's issue dies issueless. A witness who makes such a statement is entitled to no weight. His knowledge is shown in cross-examination to be mere hearsay.

Thus the evidence gives us one definite instance and one vague instance of a very modern date and neither of them prior to the date of the suit. Obviously this is inadequate to discharge the onus which lies on the plaintiff to prove a custom, uniform, definite and specific and having the force of law. See the observations of the Privy Council in *Chandika Bakhsh* v. *Muna Kunwar.*[2] None of the plaintiff's witnesses in fact deposes that the alleged custom has among them the force of law or that the obligation to return the stridhanam is of the nature of a legal obligation. Most of them seem to agree that the stridhanam need not be kept intact although caste etiquette does usually keep it intact. It is difficult to gather from their evidence what custom lays down about that, and here undoubtedly the custom is to the last degree vague and indefinite. No case has been cited as settled by a caste panchayat, and, if the custom had been in vogue, there must have been cases of this kind. The evidence therefore appears to us wholly insufficient to justify this Court in putting on one side the ordinary rule of inheritance under Hindu Law. The alleged custom is not proved by cogent evidence or by well authenticated and ancient instances, nor is it in all respects specific and definite.

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2 (1902) L.R. 29 I.A. 70: I.L.R. 24 A 273 at 281 (P.C).

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The plaintiff in argument sought to support his weak case by quoting the evidence of two of the defendant's witnesses, D.Ws. 2 and 3. D.W. 2, when the plaint custom was put to him in general terms, said that the property "will go" to the donor's family. In cross-examination he said he did not know personally of the custom. Here again is lacking the essential element, namely, the conviction that the stridhanam will go as a matter of obedience to custom having the force of law. D.W. 3's evidence is much vague and he speaks merely of a demand and not even of a payment. We do not think that this evidence is sufficient to fill the gap in the plaintiff's evidence.

It seems clear that there is a custom having the force of law by that, if the daughter of the family dies issueless, the stridhanam will revert to her parents, but there is at present no clear custom having the force of law by which such reverter occurs when the daughter has issue and dies leaving issue. There is no certain custom in such a case governing the destiny of the stridhanam, and that destiny is apparently being decided by mutual arrangement sometimes one way, sometimes another. This is the evidence of a witness examined on commission for the defendant, Ex. II (*a*) and it appears to us to represent the probable state of affairs.

It is argued for the plaintiff that granted a custom that where the woman dies issueless the inheritance would go to her parents Hindu Law would avail to send that inheritance in the same track when she has a daughter who dies issueless because under Hindu Law that daughter will not be a full owner. But obviously such an argument is untenable. The plaintiff cannot appeal to Hindu Law to support a custom which has its foundation in the derogation of Hindu Law. The manner of inheritance must be wholly either one way or the other, either according to custom or according to Hindu Law. This contention of the plaintiff has no support in the evidence of any witnesses; nor does any witness distinguish the manner and the reason of the reverter in the case of Minakshi's stridhanam, and in the case of Visalakshi's stridhanam, or suggest that Visalakshi held hers by custom merely as a limited owner; nor is the contention even found in the plaint itself.

The conclusion therefore we come to on the evidence is the opposite of that come to by the learned Trial Judge. We should have been more reluctant to differ from him if he had given any reasons for his conclusion, but his judgment is merely a setting out of the evidence and the argument on both sides with

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a pleading, it appears to us, on the whole against the plaintiff's case, and then one sentence in paragraph 18 that on a careful consideration of the evidence, he has come to the conclusion that the plaintiff is entitled to recover. For that conclusion he gives no reason except that Minakshi's and Visalakshi's amounts are kept distinct in the accounts, but this seems to us no reason at all, since, as they were donated at different times and no doubt invested at different times, it is natural that they should find separate entry in the family accounts.

We, therefore, on our conclusion, reverse the decree of the learned Trial Judge and dismiss the plaintiff's suit with costs in both Courts.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR AND MR. JUSTICE PAKENHAM WALSH.

Ramalinga Chetty and another .. *Appellants** (*Defts.*)

v.

The Vellore Mercantile Bank, Ltd., by
Agent, B. Devasikhamani Mudaliar .. *Respondent* (*Plff.*).

Ramalinga Chetty v. The Vellore Mercantile Bank, Ltd.

Hindu Law—Joint Family—Manager not father—Trade new, speculative, and totally incommensurate with family assets carried on with borrowed capital by—Debt borrowed for purposes of—Binding nature of.

The 1st and 2nd defendants and one *R*, the father of the 4th and 5th defendants, were brothers and members of a joint Hindu family governed by the Mitakshara Law Before and during the lifetime of *R*, the family carried on a small provision business and cloth business After the death of *R*, the 1st defendant and a son of the 2nd started a new speculative business in ground-nuts That business was carried on entirely out of borrowed capital and no portion of the family property was used therefor. It was carried on on a scale which was totally incommensurate with any of the family estates. For the purposes of that trade money was borrowed and a promissory note was executed therefor by, *inter alia*, the 1st defendant and the son of the 2nd The 2nd defendant, who was the eldest member of the family, did not join in the execution of the note, and did not take any part in the new business.

In a suit brought on the promissory note, *held*, that the note was not binding on the 4th and 5th defendants (minors) or on their shares in the family property.

The carrying on of an entirely new speculative business with borrowed capital on a scale which was totally incommensurate with any of the family estates is not an act which would bind the minors.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in Original Suit No. 97 of 1922.

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*Appeal No. 5 of 1925. 5th August, 1929.

Ramalinga Chetty
v
The Vellore Mercantile Bank, Ltd.

B. C. Seshachala Aiyar for appellants.

K. S. Krishnaswami Aiyangar for respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff-bank against the defendants for the recovery of Rs. 14,523-12-0 alleged to be due on a promissory note executed by defendants 1, 6 and 7 and one Venkatesa Chetti (deceased), son of 2nd defendant for Rs. 10,000 payable with interest at Rs. 1-6-0 per cent. per mensem. It is alleged that the defendants paid interest amounting to Rs. 262-8-0 and have not paid the balance. The plaintiff's case is that defendants 1 and 2 and one Ramakrishna Chetty, the deceased father of defendants 4 and 5, were undivided brothers and formed members of a joint Hindu family governed by the Mitakshara Law, of which the 1st defendant and the son of the 2nd defendant who was the second executant of the suit promissory note were the managing members and that the 1st defendant and his deceased brother, Venkatesa Chetti, had been carrying on a trade for which the suit money was borrowed on behalf and for the benefit of the joint family including defendants 2 to 5 along with their partners, and a decree is prayed for for the amount on the ground that it has not been paid.

The appellants in this case are only defendants 4 and 5. They are minors. Their father died several years ago. The question is whether the promissory note executed by defendants 1, 6 and 7 and the son of 2nd defendant is binding on the minors. The case for the minors is that the debt is not binding on them as the 1st defendant and the deceased Venkatesa Chetti were not the managing members of the family of defendants 1 to 5 but it was the 2nd defendant who was managing the family affairs, that the 1st defendant and Venkatesa Chetti had been carrying on the plaint-mentioned trade on their own account in partnership with strangers to the family, that the said trade was not an ancestral or family trade but a speculative one and that no ground is made out for charging these defendants with the liability. It is also stated that the interest is excessive and usurious.

The Subordinate Judge held that the family was undivided and that the note was binding on the minors. He has given his reasons in paragraph 9 of his judgment. It seems to us that he has not really met the various contentions urged and the evidence, oral and documentary.

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The joint family referred to in the plaint consisted of Chinnaswami Chetti, the 2nd defendant herein who was the eldest member, Narayanaswami Chetti, the 1st defendant herein, and the last brother Ramakrishna Chetti (father of the appellants) who died some years ago. The family according to the evidence originally owned lands and then began to carry on a business in provisions. The accounts of the business have been filed as Ex. C. They show that the provisions business was carried on on a small scale, Ramakrishna Chetti, the father of the appellants, being interested in the business. That business according to the evidence was closed in 1912 and there was a settlement of accounts which is signed among others by Ramakrishna Chetti. Ramakrishna Chetti according to one witness died about two years after the close of the business, that is about 1914, and one or two witnesses put it a little later 1915 or 1916 After the death of Ramakrishna Chetti we find that in 1917 two junior members of the family, which was still then trading in cloths and provisions on a small scale in Polur and an adjacent village, began to export ground-nuts to England. The business, according to the plaintiff's own witness, P.W. 5, was carried on on a very large scale and they were sending goods to Marseilles and other places to the extent of seven or eight lakhs and the business was conducted entirely by borrowing money from the plaintiff-bank. The evidence also is that the market was unsteady at the time. He says that the price of ground-nuts was fluctuating every day and the business ended in a heavy loss. It is clear from the evidence that whereas the family was before and during the lifetime of the father of the appellants carrying on a small provision business and cloth business in the village of Polur and its hamlets, in 1917, the 1st defendant and his deceased brother's son Venkatesa Chetti who were the junior members of the family in partnership with others began this speculative business in ground-nuts. It is not suggested that any portion of the family property was used for this business. According to the evidence it was carried on entirely out of borrowed capital. The promissory note was not executed by the 2nd defendant who was the eldest member but by defendants 1, 6 and 7 and by the son of the 2nd defendant. The note does not purport to bind the minors, nor does it state the purpose for which the loan was taken. On these facts the question is whether the minor appellants (defendants 4 and 5) are liable for the loss incurred in such business. In this case we are not concerned with the pious obligation of

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the son to pay off his father's debts in which case the question as to whether the trade was old or new does not arise. *Atchutam* v. *Ratnaji*,[1] *Rajagopal Pillai* v. *Veeraperumal Pillai*[2] and *Venkatasami Naicker* v. *Palaniswami Chettiar*[3] are such cases, namely cases of liability of the son, and the Court held that his liability was irrespective of the nature of the business started by the father. The present case we think is governed by the ruling of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[4] and by the decisions in *Sanyasi Charan Mandal* v. *Asutosh Ghose*,[5] *Tadibulli Tammireddi* v. *Tadibulli Gangireddi*,[6] *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomed Sait*[7] and *D. McLaren Morrison* v. *S. Verschoyle*.[8] We do not think that it makes much difference in considering the liability of a minor in respect of a new trade carried on not by his father but by another member of the family whether the family is governed by the Dayabhaga or the Mitakshara Law, as the principles which govern the decision in this case are not based on any difference between the Dayabhaga and the Mitakshara Law as to the power of a manager of a joint family where coparceners other than his own sons are concerned. Reference has been made by the learned Advocate for the respondents to *Lakshmiah* v. *Official Assignee, Madras*,[9] and it is argued that the appellants would be liable for the reason that the trade was carried on by the adult members of the family and consequently that it should be presumed that it was a trade carried on for the benefit of the family. Some of the important elements which the learned Judge noted are lacking in the present case. In *Lakshmiah* v. *Official Assignee, Madras*,[9] the family property was being used without any objection for the trade and all the members acquiesced in it, and it was held that under those circumstances the minors were liable. The learned Judges take care to state that each case must depend on its own facts. We think that case was more a decision on the particular facts than a decision which laid down any general rule, much less any general rule that would override the principles which govern the *ratio decidendi* of the cases which we have already cited. The only observation about that case I wish to make is that

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1. (1925) 50 M.L.J. 208. 2. (1927) 53 M.L.J. 232
3 (1928) 56 M.L.J. 380.
4 (1922) L R. 49 I.A. 108 I L.R. 49 C 560 · 43 M.L.J. 41 (P C).
5. (1914) I L R. 42 C. 225
6 (1921) I.L.R. 45 M. 281 · 42 M.L J. 570.
7 (1922) 44 M.L.J. 396 (P C) 8 (1901) 6 C.W.N. 429.
9 (1928) M.W.N. 576

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the fact that the family was a Dayabhaga family for the purpose of this question does not seem to make much difference. In all joint families a person who is not the father has the power of management and the criterion by which the binding nature of such debts should be decided is whether they were borrowed for the benefit of the family and would bind the minors. It cannot be said in the present case that the carrying on of an entirely new speculative business with borrowed capital on a scale which was totally incommensurate with any of the family estates, for we find that the family was carrying on only a small business before, by the other members is an act which would bind the minors. One other feature in this case is that the eldest member is not shown to have executed the promissory note or taken any part in the ground-nut business. It is argued that the adult members executed two mortgage-deeds Exs. F and F-1 and that it should be presumed that all of them carried on this speculative business in ground-nuts. But Exs. F and F-1 were executed in 1920 when the business practically ended in a loss and so they would not afford evidence as to the state of the dealings anterior. We are of opinion that this business which was started by two members of the family in partnership with strangers was not a business which was of such a nature as would bind the minor appellants. We allow the appeal and dismiss the suit against defendants 4 and 5 and their share in the family property with costs in this and the Lower Court.

A.S.V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM, MR. JUSTICE JACKSON AND MR. JUSTICE REILLY.

Chedalavada Subbayya .. *Appellant** (*1st Deft.*)

v.

Chedalavada Ananda Ramayya .. *Respondent* (*Plff.*).

F. B. Subbayya v. Ananda Ramayya.

Hindu Law—Partition suit—Future marriage expenses of unmarried daughters—Liability of the sons

Held by the Full Bench (*Jackson, J, dissenting*)—In a suit for partition between a Hindu father and his sons, the sons are liable for the future

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*S.A. No. 923 of 1925. 20th December, 1928.

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marriage expenses of their unmarried sisters in proportion to their shares of the property divided.

Ramalinga Annavi v. *Narayana Annavi*, (1922) L.R 49 I.A. 168. I L R 45 Mad 489 43 M.L.J. 428 (P.C.) distinguished

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Bapatla in A.S. No. 58 of 1924 (A.S. No. 70 of 1924 on the file of the District Court of Guntur) preferred against the decree of the Court of the District Munsif of Tenali in O.S. No. 754 of 1922.

[*N.B.*—This Second Appeal originally came on for hearing before Jackson and Reilly, JJ. and, as their Lordships were inclined to disagree with each other on the point of law after hearing the appeal for some time, they requested the Chief Justice to allow them to form a Full Bench with another Judge and thus the Full Bench was constituted as above.—REP.]

P. Satyanarayana Rao for appellant.

Ch. Raghava Rao for respondent.

The Court delivered the following

JUDGMENTS. *Ramesam, J.*—This Second Appeal arises out of a suit for partition. The plaintiff is the son of the 1st defendant by the latter's first wife. The 2nd defendant is the son of the 1st defendant by his second wife. The 3rd defendant is the widow of a predeceased brother of the 1st defendant. The 1st defendant has four daughters by his second wife, of whom the first had been married before and the others were all unmarried at the filing of the plaint. The eldest of these was married while the suit was pending before the District Munsif about four months before his judgment, and the other two still remain unmarried. The seventh issue in the case runs thus: Ramesam, J.

"To what provision, if any, is 1st defendant entitled for marriages of his unmarried daughters?"

The District Munsif found that the 1st defendant spent Rs. 2,000 including dowry and expenses for the marriage during the pendency of the suit, and that the 1st defendant was entitled to one-third share from the plaintiff. Similarly he fixed Rs. 2,000 for each of the marriages of the remaining two girls to be married and the plaintiff's one-third share was charged on his share of the property. There was an appeal by the defendant and also a memorandum of cross-objections by the plaintiff. Among the points for determination stated by the Subordinate Judge are Point 3, namely:

"Whether the plaintiff is liable to contribute to the marriage expenses of the daughters of the second wife of the appellant,"

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and Point 4, namely:

"What were the expenses incurred in marrying the daughter of the appellant who was married after suit"

On the 4th point, he found that the expenses of the marriage might reasonably be fixed at Rs. 2,000; but on the 3rd point he held, relying on *Ramalinga Annavi* v. *Narayana Annavi*,[1] that the plaintiff was not liable to contribute out of his share towards the marriage expenses of the 1st defendant's daughters married after the date of the suit or to be married. Though the decision in *Ramalinga Annavi* v. *Narayana Annavi* [1] relates to the marriage of a male coparcener, he thought that the principle applies also to the marriage of a female member. This Second Appeal is filed by the 1st defendant and before us it was argued on his behalf that all the members of the joint family are liable to contribute to the marriage expenses of the three daughters.

The learned Advocate for the appellant in the course of his arguments referred to a verse of Yajnavalkya quoted at p. 239 of Vol. II of Colebrooke's Digest (Bk. V, Ch. 2, LXXVII). This verse is also cited in Banerjee's Stridhanam, 3rd Edition, (pages 174-5). बालस्ववासिनीवृद्धगर्भिण्यातुरकन्यकाः । संभोज्यातिथिभृत्यांश्च देम्पत्याः शेषभोजनम् ॥ The verse does not occur in the Vyavahara Adhyaya or Book 2 of Yajnavalkya, but in the Achara Adhyaya or Book 1, where it is verse 105. The translation of that verse of Yajnavalkya and the corresponding commentary of Mitakshara shows that the verse relates to eating and not to divide the property (*vide* Vol. 21 of the Sacred Books of the Hindus, Yajnavalkya with Mitakshara, page 227). A similar verse occurs in Vasishta (*vide* Sacred Books of the East, Vol. 14, Ch. 11 or Dutt's Dharma Sastras, page 777) where also it refers to eating. A similar verse also occurs in Manu. It is obvious that Jagannadha misquotes a verse of Yajnavalkya misreading the word "bhoj" (to eat or to feed) as "bhaj" (to divide) and no argument can be rested on this quotation. I refer to this merely to eliminate it from my consideration in the rest of the judgment.

The main contention of the appellant is that daughters are entitled to be maintained by the joint family including the father. This right is historically the remnant of an original right to a share in the property itself. He contends that partition between the male members does not put an end to the right but the members or at least the members of a branch continue to be

1 (1922) L.R. 49 I.A. 168: I.L.R. 45 M. 489: 43 M.L.J. 428 (P C)

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liable to her maintenance. We have got a series of cases to show generally that the joint family property is liable for the marriage expenses of a daughter and where the father is dead and the property has survived to the other members, whether sons or not, they are liable for the marriage expenses. (*See* also Strange's Hindu Law, Vol. II, page 313.) It is unnecessary to refer to these cases in detail, for it is admitted by the respondent that members of the joint family, who get the property by survivorship after the father's death, are liable for the marriage expenses of the daughters. We have, for instance, *Tulsha* v. *Gopal Rai*[2] and *Vaikuntam Ammangar* v. *Kallapiran Aiyangar*,[3] where it is observed:

> "That the expenses are to be borne by the family property just in the same way as the cost of maintenance there seems no doubt upon the authorities (see *Tulsha* v. *Gopal Rai*[2]; 'West and Buhler,' 754; Mayne's 'Hindu Law,' sections 81, 408.) The *common practice of providing in partition decrees for the marriage expenses of daughters* can hardly be accounted for except on the hypothesis that such expenses are properly chargeable on the family property"

The dictum is not only valuable as an authority on the question of law but also as showing a practice to the knowledge of the learned Judges. Other cases are *Bapayya* v. *Rukhamma*,[4] *Bai Mangal* v. *Bai Rukhmini*,[5] which is a case of maintenance of widowed daughters, but incidentally refers to the text relating to the maintenance of unmarried daughters, *Gangu* v. *Chandra Bhaga Bai*,[6] referring to unmarried daughters of disqualified persons and *Nandan Prasad* v. *Ajudhia Prasad*.[7] These cases arose after the death of the father and are not directly authorities for the liability on partition during the father's lifetime. They are referred to as showing the foundation of the liability which is shown by them to be the possession of the joint family property. During the father's lifetime if there is no partition, that the whole family is liable for the marriage of the daughters is not denied by the respondent. But he contends that such liability of the joint family during the father's lifetime was only because of the father's obligation to maintain and bear the marriage expenses of his daughters and the obligation falls upon the joint family through him, and when there is a partition it is confined to the father and his share only. It is this position which has got to be examined. If the obligation is merely that

2 (1884) I.L.R. 6 A 632.
3 (1900) I.L.R. 23 M 512: 10 M.L.J. 111.
4. (1909) 19 M.L.J. 666
5 (1898) I.L.R. 23 B 291.
6. (1907) I.L.R. 32 B. 275 at 281.
7 (1910) I.L.R. 32 A 325 (F.B.).

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of the father and it is only through him that it falls upon the joint family, the contention of the learned Advocate for the respondent may perhaps be correct. We may examine the history of the law as to the basis of the right of the daughter to be maintained and to be married. It seems to me that so far as the joint family property is concerned, the obligation is that of all the members of the family, that is, the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint family. No doubt in all systems of law a parent is bound to maintain his child till a certain age. For instance, Banerjee in his book on Marriage and Stridhanam, 3rd edition, at p. 191 observes:

"that a man should be bound to maintain his legitimate children is natural and obvious; and the same texts that enjoin him to support his wife may be cited also for the present purpose,"

and he quotes Manu IX, 108; XI, 9, 10; Colebrooke's Digest, Bk. 5, 77; Vol. II, Ch. IV, 11, 12; 1 Strange 67. It is doubtful how far this obligation of a parent to maintain a child which is part of all systems of law including Hindu Law extends to the marriage of the child. On the other hand, it may be said that the obligation to marry the daughter is not a legal obligation, however much it may be a religious obligation. That is the view taken in *Seshammal* v. *Munisami Mudaliar*[8] and *Sundari Ammal* v. *Subramania Aiyar*.[9] In those cases it does not appear that the father was a member of the joint family or had ancestral property. The cases were discussed on the footing of the general obligation of a father to maintain or marry his daughter, and it was held that the father was not under an obligation to marry his daughter. On the other hand, it may be said that at least among Brahmins and Vaisyas with whom pre-puberty marriage is compulsory as a religious injunction, the father is legally bound to marry his daughter. But whatever may be the true view as to the liability of a father to marry his daughter considered by himself and by reason of the parental relation and apart from the possession of the joint family property, so far as the possession of the joint family property is concerned, there is no doubt that the father is bound to marry his daughter and that not because of a religious injunction about pre-puberty marriage but because of a better reason, namely, the daughter's right to be married is really the historical remnant of a larger right. It is therefore futile to

8. (1897) 8 M.L.J. 105.
9. (1902) I.L.R. 26 M. 505.

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confuse the two obligations, namely, the obligation of the father as a mere parent apart from property and the obligation of the father by reason of the possession of the joint family property. It is therefore not correct to say that the latter obligation is derived from the former. I think the two are independent and it is not that one is based upon the other. For this purpose we have to examine the growth of the law relating to the rights of brothers and sisters in a joint family from the earliest times up to the present day. In the very early law of property, the sons had no right to compel partition against the wish of the father except in one special case, which was, where he was old, disturbed in intellect or diseased. Omitting this special case, in general the father may make a partition because he desired it, or because he has no desire for wealth, and is disinclined to pleasure and his wife is incapable of bearing further children. Omitting these three cases, the only case that remains is after his death, when, of course, a partition can be made by sons. These four periods of partition are enumerated in Mitakshara, Chapter I, section 2. It is contended by the learned Advocate for the respondent that this section relates to the self-acquired property of the father and section 5 relates to the ancestral property of the father. I do not agree with this contention for the very cogent reasons given by Sundara Aiyar and Sadasiva Aiyar, JJ., in *Srinivasa Aiyangar* v. *Thiruvengadathaiyangar*.[10] At p. 562, Sundara Aiyar, J., observes:

"The contention is that these verses show that section 3, verse 1, dealing with partition after the father's decease relates only to the self-acquired property of the father. To a question put to the appellant's vakil from the Bench, which text, then, provides for the division of the father's ancestral property his answer was that section 5, verse 1, does so. . . . But this verse is intended merely to show that where the brothers have an unequal number of sons, the grand-sons take *per stirpes* and not *per capita* "

At page 563 referring to the Smrithi Chandrika the learned Judge observes:

"There is nothing to show that the author of the Smrithi Chandrika understood the expression 'paternal wealth' as meaning the self-acquired property of the father "

Much clearer are the observations of Sadasiva Aiyar, J. at page 567:

"The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression 'paternal estate' when used in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit

10 (1914) I.L.R. 38 M. 556: 25 M.L J. 614.

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or obtain *through his relation as such son* to his father. In *Venkatarayu* v. *Kotayya*[11] I have attempted to show that according to the Shastras, sons had no right in the property which belonged to their father till both their father and mother were dead"

Lower down he refers to Mitakshara relying on a text of Gautama inferring the son's rights by birth in the (self-acquired and ancestral) properties of the father. The observations continue up to page 570 on the proper interpretation of Mitakshara. I generally agree with these remarks. I do not think that it can be said that section 1 refers to the self-acquired property of the father in the modern and technical sense of that term and that section 5 refers to the ancestral property of the father. The object of section 1 was to narrate the four periods of partition of a father's property, that is, the property which was held by the father whether it was self-acquired or ancestral; it refers to a case where the father was holding the property himself, that is, without being joint with other brothers. In other words, it refers to a case of a father and sons only and discusses the modes of partition between such a family. It describes three modes of partition during the father's lifetime, two of them being practically on his desire, one a special case and fourthly, after his death. These modes negative the right in the sons to compel partition in general. Section 5 deals with partition of a grand-father's property, that is, where there is not merely a father but father and his several brothers holding jointly, and they having sons. As there is no division between the members of the second generation, the property is referred to as the grand-father's property and the text discusses how it is to be divided between members of the third generation. In such cases no doubt the section says there is a right by birth, not that such right did not exist in the case of section 1 but only no right to partition. The object of section 5 is to lay down the division by *stirpes*. Placitum 7 of section 5 of the Mitakshara suggests a different conclusion. It is not clear to me that the word "acquired" means in this passage self-acquired in the modern sense of the term. But whatever inconsistencies we may find in the Mitakshara and whatever difficulties we may feel in reconciling sections 1 and 5, the verses of Yajnavalkya are very clear and the observations of Beaman, J., quoted by Sadasiva Aiyar, J., in *Srinivasa Aiyangar* v. *Thiruvengadathaiyangar*[10] are very appropriate. All that I am inclined to hold at present is that the four periods of partition mentioned in

10 (1914) I.L.R. 38 M. 556 · 25 M.L.J. 644.
11 Second Appeal No. 360 of 1911.

section 1 are applicable to the grand-father's property also, the division of which should be *per stirpes*. It is not clear to me that the right in the son to compel partition was recognised in the Mitakshara. It seems to me that it is the inference in the modern times from the right by birth. If in the Mitakshara sons themselves have no right to partition, much less could the daughters. But this of course does not mean that the daughters have no interest in the property. Though it is not expressly stated that they have a right by birth, we have got the fact that after the father's death the daughters had a right to a one-fourth share against the brothers. Section 7, verse 5 refers to a fourth part of a brother. How does this right arise? It cannot be said that the sons only were sharers in the property during the father's lifetime and that the daughters had no share, but after the father's death new sharers are introduced and that the sons' share is diminished. At this stage I may refer to some discussion which took place during the course of the argument as to what is meant by one-fourth share of the daughters. The text of Manu quoted at page 294 of Colebrooke's Digest, Vol. II, shows that three-fourths of the whole is taken by the brothers and one-fourth is taken by the sisters, though it is expressed in a round about form, "let each give a fourth part of his own distinct share." The text of Katyayana quoted at page 297 is to the same effect: "For unmarried daughters a fourth share is ordained, and three shares for sons.'' But placitum 5 of S. 7 of Chap. I of Mitakshara speaks about a fourth part of a brother's share which of course works out to a different fraction. The Smrithi Chandrika and other commentaries give their own explanation as to what is meant by this one-fourth share sometimes saying that it is not a definite share, but means marriage expenses, sometimes giving a different mode of working the fraction. In this Presidency the whole discussion as to what the exact mode of working out the fraction is academical, for now it is settled law that the daughters are not entitled to a share, but all the same the discussion shows that the right of the daughter for maintenance up to the going to the husband's house and for marriage expenses is the present remnant of the right to a share Therefore the right of the daughters in the father's lifetime, however much it cannot be compelled by partition, must still be described as a right or interest in the property. In Sarkar's Hindu Law, 6th edition, page 328, the unmarried daughter's right is thus described:

"Similarly an unmarried daughter acquires an *imperfect right in the father's property* by virtue of which she enjoys the same and is main-

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tained out of it until marriage and is also entitled to a quarter share, if partition takes place before her marriage, that is to say, when she continues as a member of the family"

I agree with this passage. It seems to me that in the early law both the rights of the sons and the daughters were imperfect rights in the property which cannot be materialised by compelling partition against the wishes of the father, but whereas the sons' right gradually developed into a right to compel partition, the daughters' right first became a right to compel partition against the brothers only and not against the father, and latterly degenerated into merely a right to maintenance and marriage expenses. When the daughter's right is so viewed, Mitakshara, Chapter I, section 7, placitum 14 does not mean that the daughter's interest is not an interest in the property. It only shows that during his lifetime she could not compel partition and should take whatever he gives, which of course does not mean that he is not bound to maintain her or marry her. This is all what is meant by section 482 of Mayne's Hindu Law. The first sentence, "Where a partition takes place during the life of the father the daughter has no right to any special apportionment" simply means that the daughter cannot compel partition and ask for a definite share during the father's lifetime, but it does not mean that she has no interest in the property for she had the right to a fourth share against the brothers after her father's death. I therefore infer that the right of the daughter for marriage expenses and for maintenance is a right over the joint family property of the father and the brothers and though during the father's lifetime she cannot enforce such right in the form of a partition because of placitum 14 of the Mitakshara, still if the father is willing to exercise his discretion in favour of the daughter by giving something towards her marriage expenses, the joint family property is liable towards such expenses. I have taken pains to trace the early history of the law and draw the above inference simply for the purpose of showing that the right to get expenses out of the joint family property is not a right derived from the parental obligation of the father to maintain a child but an independent obligation arising out of the joint family property law. The next question that arises is—after partition, on whom does the obligation fall? Mr. Raghava Rao says on the father only, because it is an obligation peculiar to the father by reason of his parental position. We have seen that the obligation existing before the death of the father is not the obligation derived from the parental position. If so, there is no reason why after parti-

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tion it should fall upon the father only. It is true there are cases showing that, while during the continuance of a joint family the obligation falls on the whole family, after partition, it does not fall upon the whole family but on some branch or branches of the family. For instance in a partition between a father and two sons, debts contracted by the son not for family necessity will not fall on the whole joint family but only on his branch, that is, on himself and his descendants, but not on his brother or on his father. But the debts of a father not illegal or immoral will certainly fall upon all branches of the family not only upon the father but upon the branches of each of his sons. In each case we have to see whether there is an obligation peculiar or personal to the head of the particular branch or sub-branch or an obligation to which the whole family is liable. In the case of a father's debts the whole family is liable; in the case of son's debts, the son's branch only is liable. Similarly in respect of marriage expenses of the daughter of a father, the whole joint family is liable. Therefore after partition the obligation falls upon all the members of the family. But in the case of the marriage of a son's daughters (the case put by my brother Jackson, J., in his judgment) though during the continuance of the joint family the whole family must bear the expenses, still primarily, it is the obligation of the son's branch and the father has nothing to do with it. I do not concede that no part of the family is liable. It stands exactly in the same position as the son's debts as contrasted with the father's debts. Therefore, after partition it falls upon the son's branch only and not upon the brothers' branches or upon his father. To put the matter briefly, the obligations of an ancestor and his family would fall after partition upon all the members of the family but the obligation of the head of a sub-branch will fall upon that branch after partition and not on other collateral branches or upon members higher in the genealogical tree. The analogy of the debts which is well established and well known makes my meaning clear. But Mr. Raghava Rao says that whereas the law covering debts relates to debts that are incurred, we are here dealing with an obligation which has not yet been incurred but which is to be incurred after partition. But the reply to this argument is that the obligation has been incurred before the partition by the birth of the daughters. It is not a case of obligation which is to be incurred after the partition. Only it is to be completed and materialised at the actual time of the marriage which may be

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after partition, but this does not mean that the obligation does not arise before the partition. This is easily seen when we remember that the obligation is not merely an obligation to maintain but the present remnant of what was formerly an interest in the property. I therefore hold that the obligation of a joint family does not after partition fall on the father only but on all the members of the family.

The idea I attempted to express in the last paragraph, namely, that the obligation to marry a girl is binding upon her father or his descendants but not upon *his* collaterals or his ascendants is also implied in the following dicta. In *Narayana* v. *Ramalinga*[12] Sankaran Nair, J., says:

> "Nor is it necessary for us to decide, as we have been pressed to do, that if provision for future marriages is obligatory it is so only between *coparceners of one generation*, though the references in the texts to 'brethren' may support that conclusion."

Though they did not decide the point they might have disallowed the marriage expenses in that case on this ground also. In *Gopalam* v. *Venkataraghavulu*[13] Seshagiri Aiyar, J., says:

> "Such a provision should be made only for persons who are *of the same degree of relationship* as those who have been married at the expense of the family."

I may here mention that the decision in *Gopalam* v. *Venkataraghavulu*[13] was reversed by the Privy Council on another point. In *Yerukola* v. *Yerukola*[14] the paragraph at page 650 and particularly the sentence, "*Gopalam* v. *Venkataraghavulu*[13] and *Jairam* v. *Nathu*[15] are distinct authorities against the extension of this concession to persons *who are not in the same degree of relationship* as those who have been married at the family expense" are to the same effect. So also in *Jairam* v. *Nathu*[15] it was held that the children of a brother are not entitled to any sum for the performance of ceremonies on partition. (*See* also West and Buhler, 4th edition, page 714, where they say "but not of a brother's son"). These dicta will not now apply to marriages of males after the decision of *Ramalinga Annavi* v. *Narayana Annavi*,[1] which reversed one of these, namely, *Narayana* v. *Ramalinga*,[12] but will still apply to the marriages of female members of the family.

Mr. Raghava Rao also sought to rely on the analogy of an illegitimate son of a father, whose right to be maintained by

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1 (1922) L.R. 49 I.A. 168: I.L.R. 45 M 489: 43 M.L.J 428 (P C).
12 (1915) I L R. 39 M 587 at 591
13. (1915) I.L.R. 40 M. 632 at 639: 29 M.L.J 710
14. (1922) I.L R. 45 M. 648: 42 M.L.J 507 (F B).
15 (1907) I.L.R. 31 B. 54.

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a joint family will fall on the father only after partition. It seems to me that the sons can never be bound by such an obligation, because it is an immoral obligation. It is not illegal in the sense that the law imposes no obligation on the father; it is certainly legal and, so long as the father is joint and especially when he has no self-acquired property, the joint family may have to bear the expenses. But after partition to impose an obligation upon the sons is to make them liable for an immoral obligation of the father. This ground is enough to distinguish the case of an illegitimate son. We are here dealing with an obligation of the father which is both legal and moral.

My general conclusion as to the liability of the joint family including the father and sons is also supported by Strange's Hindu Law, Vol. I, page 170. Medhatithi who is a famous commentator on Manu after quoting Manu 9, V. 118, proceeds to comment on it At page 53 of the Hindu Law by Ghose, Vol. II, he refers to the text of Narada, "What is left of the father's property after discharging the father's debts (shall be divided by the brothers)." Then he says, "By payment of debts, the duty of marrying a daughter is also intended." This shows that my likening the obligation to marry a daughter with debts is not fanciful but is sanctioned by a commentator. Mr. Raghava Rao contends that Medhatithi is only a commentator on Manu, an ancient Smrithi writer, and has not got the same weight as Mitakshara; but Mitakshara itself is a commentary on the ancient Smrithi of Yajnavalkya I do not mean to say that when Medhatithi and Mitakshara are in conflict, Medhatithi should override Mitakshara in this Presidency. In the present case there is no such conflict. I have drawn my conclusion from the consideration of Mitakshara itself and I refer to Medhatithi merely as supporting my inference.

Only one question remains to be discussed, namely, whether the decision in *Ramalinga Annavi* v. *Narayana Annavi* [1] applies to the case of daughters as held by the Subordinate Judge. In my opinion, the two cases are plainly distinguishable. In the case of male members the right to maintenance and marriage is a right existing during jointness and it is *in addition to* the claim of partition. When a family is divided there are no more items of accounts to be settled by coparceners. When the member himself sues for partition, it may be said that he elects to get one advantage and lose another advantage. But,

1. (1922) L.R. 49 I.A. 168: I.L.R. 45 M 489: 43 M.L.J. 428 (P C)

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as my learned brother Jackson, J., pointed out in the course of the argument, the partition may be at the instance of a father or an elder brother. In such a case the conclusion in *Ramalinga Annavi* v. *Narayana Annavi*[1] looks harder than in the other case because the younger unmarried brother does not choose. But even there it can be said though he loses one advantage, he gets another advantage, namely, being the master of his own property even if he does not desire it. But whatever hardship there may be in the matter, it is clear on the other hand that all mutual rights and liabilities *inter se* between two coparceners are put an end to by partition. It is difficult to say that there is still a claim by one outstanding against the other. It may be that a father may anticipate a suit for partition and may set apart a sum for the expenses of the marriage of an unmarried son prior to the suit, and probably future attempts to evade the decision will be made in this direction. The question before me is not to explain or justify the decision of the Privy Council but to see how far it applies to the case of a daughter. In the case of a daughter her rights to maintenance and to marriage expenses are *not in addition to the right of partition but in substitution for an ancient* right to a share which has now become obsolete. There can be no suit for partition with her as a sharer. In her case there can be no question of mutual rights and obligation between her and other coparcener being put an end to by partition. We thus see that every circumstance applicable to a male becomes different when attempted to be applied to a female. On principle it is difficult to see how a third person's rights against *A* and *B* can be affected by some action between *A* and *B*. I have already dealt with the apparent anomaly (for it is only apparent) that rights against a joint family of certain members may after partition subsist only against some of the members and not against all the members. That is because the obligation is peculiar to one branch and through it only to the whole family. Apart from that, there is no reason why the daughter's rights should be put an end to by partition altogether. It is conceded before us that, after the father's death, brothers, who are liable to the marriage expenses of their sisters, cannot put an end to her right by dividing the property between themselves I do not see how there should be a different result during the father's lifetime. Similar cases occur in the case of the right to maintenance of widows of predeceased members of the family. Here again the right to maintenance is

1. (1922) L.R. 49 I.A. 168: I.L.R. 45 M. 489: 43 M.L J. 428 (P.C)

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not put an end to by partition, though, with reference to the relationship of the widow to the members of the family, her claim may after partition subsist only against some branches and not against the whole family. Anyhow in this respect it is clear that the position of a female is so different from the position of a male member that I hold that *Ramalinga Annavi* v. *Narayana Annavi*[1] does not apply to a female member. I therefore hold that the Subord'nate Judge has not correctly decided the third point. I would therefore allow a deduction out of the amount to be decreed to the plaintiff of a sum of Rs. 666-10-8 being one-third of the expenses actually incurred for the marriage of one of the daughters after suit. As to the other girls while holding that the plaintiff is also liable to contribute one-third of the expenses, I think it is not necessary to make an anticipatory provision by way of setting apart a particular sum. It is true that the decision in *Srinivasa Aiyangar* v. *Thiruvengadathaiyangar*[10] where Spencer, J, directed such a sum should be set apart was followed in *Gopalam* v. *Venkataraghavulu*,[13] but this is after all a matter of discretion. Provided we safeguard the rights of parties there is no harm in not actually setting apart the amount. It may be that the marriage may never come off for reasons which need not be suggested. It is enough to fix a maximum limit for the expenses of marriage and to make it a charge on one of the items of the plaintiff's property for one-third share. Though one girl's marriage has cost Rs. 2,000, I do not see why Courts should encourage habits of extravagance in the matter of dowry. Where the expenses have been actually incurred, it may be, we have no discretion. But where it is to be incurred we should do nothing to encourage extravagance. I would fix a maximum limit of Rs. 1,500 for the expenses of the marriage of each of the two daughters that remain unmarried. Of course the actual amount may be less; this is only the maximum amount and it is enough to charge an item of the plaintiff's share for Rs. 1,000 to cover one-third share of the expenses of the marriages of the two girls. The 1st defendant will give notice before the marriage and before making his claim to the plaintiff's share of the actual amount of the dowry that is settled. This disposes of the Second Appeal.

There is a memorandum of objections filed by the plaintiff. The Subordinate Judge would not enquire into the amount of

1 (1922) L.R. 49 I A. 168: I.L R. 45 M 489 43 M.L.J. 428 (P C).
10 (1914) I.L R. 38 M 556: 25 M.LJ 644.
13. (1915) I.L.R. 40 M 632: 29 M.L.J. 710.

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mesne profits for the year 1922, though the judgment of the District Munsif dealt with it and awarded profits. By a slip, the amount of mesne profits was omitted in the decree; but the plaintiff is certainly entitled to the profits. We call upon the Subordinate Judge to hear objections of both parties as to the quantum of profits for that year and report his finding to the High Court within two months. Though the appellant has not appealed in this matter, I think he is also entitled to be heard on the question of the proper amount. There is no need for him to appeal, because there is no decree against him. That is no reason why his objections ought not to be heard. Seven days will be allowed for objections.

Another objection raised by the respondent is that item 21 was wrongly disallowed by the Subordinate Judge. The question is one of fact and we cannot go into the correctness of the Subordinate Judge's judgment. It may, however, be pointed out that he relies on the evidence of P.W. 3, which shows that the sum was paid to the payee and not to the 1st defendant. This objection must be disallowed.

Both parties will bear their own costs both in the Second Appeal and in the memorandum of objections in this Court. The order of the Lower Appellate Court as to costs will stand.

Jackson, J.

Jackson, J.—In this suit a son sues his father and his step-brother for partition. There are three step-sisters, and the question for determination is whether provision should be made for the costs of their marriages. One of the sisters was married after the institution of the suit, and two are still unmarried. In the Munsif's Court the plaintiff seems to have admitted that the cost of these marriages would fall upon the coparcenary. But the point was taken in the Lower Appellate Court and the learned Subordinate Judge holds that the liability and cost fall upon the father and not upon the brothers. Therefore any marriage performed or to be performed after the disruption of the joint status cannot be a charge upon the coparcenary. The Subordinate Judge has assumed that after partition the daughter would have no claim upon the family, and applies the ruling in *Ramalinga Annavi* v. *Narayana Annavi*[1] only to justify his conclusion that partition had occurred before one of the daughters was married, so that the expenses of her marriage could not be charged against the family assets as cost incurred before the family was disrupted. Having found so much he proceeds

1. (1922) L.R. 49 I.A. 168. I.L.R. 45 M 489. 43 M.L.J. 428 (P.C.).

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"the plaintiff who became divided . . . . was not liable to contribute out of his share . . . . towards the marriages yet to take place . . . . ," paragraph 16. That follows upon his assumption of the law, and not upon anything to be found in *Ramalinga Annavi* v. *Narayana Annavi*.[1] What we have to decide is whether his assumption is correct.

In the course of the discussion two positions stood out in clear contra-distinction. It is agreed that the most which a daughter may claim on partition is maintenance including under that term her marriage expenses. The appellant would have it that this maintenance is claimed as a matter of right against the coparcenary, it being the last vestige of the daughter's original share. The respondent on the other hand argues that that share has passed entirely into oblivion. The maintenance is what the daughter may claim from her father, and if it is paid by the coparcenary in the father's lifetime before partition, that is merely because the father happens to be absorbed in the joint family. As soon as the father divides from the joint family the liability to maintain his daughter is his alone. It is no longer a liability chargeable upon family assets. But if he dies before partition his liability must be undertaken by the coparcenary, and provision made for it on partition.

If the appellant's view is correct, one would expect every female member who in the old days would have had an actual share still to have a right of maintenance chargeable on the family property. To take three generations, calling them father, son, and grandson, the daughter and the grand-daughter would both have their right of maintenance against the family property. But it seems to be conceded that the family would not be held liable for a grand-daughter's marriage expenses, that being an obligation which falls after partition upon the son's share. Therefore if the daughter's right is to be traced to her original but obsolete share, there would seem to be a flaw in the logic of the argument so long as the grand-daughter is allowed no such right. Unless it is to be assumed that these provisions in Hindu Law are arbitrary or fortuitous, some logical basis must be found other than this original right to share. One may start with the primary conception that a father must maintain his children, a proposition which, if we are to delve into prehistoric times, must have been self-evident before the Mitakshara. Then comes the idea of children acquiring coparcenary rights at birth. Does a daughter acquire such a right, or must

1 (1922) L.R. 49 I.A. 168: I.L.R. 45 M 489 43 M L.J. 428 (P C).

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she be dependent upon her father? The answer to this question seems to be in the Mitakshara, Chapter I, section 7 (5) and (14):

"By the brethren after the decease of their father, sisters should be disposed of in marriage giving them as an allotment the fourth part of a brother's share. (14) Therefore after the decease of the father an unmarried daughter participates in the inheritance But, before his demise, she obtains that only whatever it be which her father gives."

I cannot profess to do more than interpret this English version. But it has not been suggested to us that the translation is wrong, it is plain English and seems to mean that the daughter participates in the inheritance after her father's death; but before his death she does not. That too is how the passage is read in Mayne, section 482, Edition IX:

"Where a partition takes place during the life of the father, the daughter has no right to any special apportionment She continues under his protection till her marriage, he is bound to maintain her, and the expenditure he is to incur is wholly in his discretion"

This can hardly mean that where a partition takes place during the life of the father, the daughter has a right to some apportionment, but the special figure must be decided by the father, who is bound to maintain her. If the father is to incur the expenditure it is not incurred by the family assets. Nor do I interpret the Mitakshara in that way as reading, after the decease of the father an unmarried daughter participates in the inheritance and before his demise she participates in the inheritance, only the exact amount must be decided by her father. If that could be the right rendering the translation is most unhappy. I may add that if the father can name the figure of the sum to be apportioned to his daughter out of the common fund on partition it puts him in a very invidious position.

I do not think that any help is to be gained from the analogy of cases where the father is dead before the partition. All are agreed that in that circumstance the coparcenary is liable; but whether the liability was always upon it, or has fallen upon it because a fellow-member is dead, these cases will not help us to decide.

There does not seem to be a single case directly in point. The respondent relies upon the summary of law in *Rajna Rao v. Rajah of Pittapur*,[16] which, I think, supports his case as far as it goes, but of course is not a direct decision upon the point. The members of an ordinary joint family governed by the Mitakshara law are placed in categories. First there are the persons with the inchoate right to raise an action of partition,

16 (1918) L.R. 45 I.A. 148: I.L.R. 41 M 778: 35 M L J 392 (P.C.).

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who, so long as they remain joint are entitled to have their necessary expenses paid out of the family income, a right of maintenance which begins where coparcenary begins and ceases where coparcenary ceases. It was not suggested that daughters in these days belong to that class, which is confined to the male members of the coparcenary. Then come the maintenance holders who cannot succeed as co-owners. Firstly idiots, lunatics, and so on, who suffer from a personal disability. Daughters cannot come into that category, because the children of such persons get the full right of coparcenary. Lastly there is the class of persons whose right of maintenance lies in personal relationship. The husband is obliged to maintain the wife, the son the parent, and the father the infant child. It is an obligation attaching to the individual, independent of the fact of there being joint family property. Therefore it would seem from this summary that the daughter's right to maintenance is a right to be maintained by her father. When her father is a member of the joint family the cost of maintenance will be defrayed from the joint income. If her father dies, the joint family must assume the liability. If he lives and goes out of the joint family, he takes with him his personal liability to maintain his daughter. If it is held on the contrary that the liability rested originally upon the joint family, and continues to rest upon the joint family as a common debt at the time of partition, then the observation that the right of the infant child to maintenance lies in personal relationship must be held to be wrong.

If the daughter's primordial right to a share in the joint family property had survived to these days in the form of a claim for maintenance and marriage expenses, it would be such an interesting feature of Hindu Law that modern students and commentators could hardly have overlooked it. Yet none of them mention it; and though the *argumentum ab silentio* should not be unduly stressed, their silence is certainly significant. Mayne, as I read his commentary, does not admit the existence of any such right. In her father's lifetime the daughter is dependent upon the father (whether he be in or divided from the coparcenary) And the allotment she gets after his death though it is called a fourth share is only a sufficient amount to defray her nuptials. Sir Thomas Strange (Ed. 1830, p. 190) says "Daughters take nothing as of right during their father's lifetime." Ghose and West and Buhler do not appear to discuss the question. Sarkar (Ed. V, p. 303) says that a daughter acquires an

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imperfect right in the father's property by virtue of which she is maintained out of it until marriage, and is also entitled to a quarter share if partition takes place before her marriage, that is to say, when she continues as a member of the family. If "father's property" here means joint-family property it undoubtedly supports the appellant's case; but may it not mean that the daughter has a claim to maintenance against her father's property; and by virtue of this right she can claim a share when her father is dead and she is still a member of the coparcenary. The only way in which an unmarried daughter can cease to be a member of the family would seem to be by her father becoming a divided member and herself also being treated as divided in his branch. If that is so, even according to Sarkar's commentary, in the present case the daughter of the already divided father would have no right to a share.

That the right to maintenance after the death of the natural supporter is derived through him, and is not an independent right to a share of the family assets is borne out by an *obiter dictum* of Kumaraswami Sastri, J., in *Natarajan* v. *Muthiah Chetty*[17]:

"persons who by reason of certain circumstances are not entitled to a share in the estate are entitled to maintenance by those to whom the estate has passed by survivorship The liability to maintain is on the coparceners by virtue of the fact that they take the estate of their deceased relations."

And even if one goes back to the earliest texts, the right to maintenance seems to be a right against those who have survived and enjoy the family assets, rather than a right to enjoy a share of those assets along with them. "Sisters also who are not already married must be disposed of in marriage by the brethren, contributing a fourth part of their own allotments." (Mitakshara, Chapter I, VII, 6). Not, be it noted, taking a fractional allotment in her own right but looking to the brothers for a contribution from the property already divided amongst them. But here a difficulty supervened. If a brother had to contribute quarters of his share to several sisters, or several brothers to one sister, gross inequalities would result. Therefore the commentators exercised their ingenuity and devised a fictional extra brother whose fourth share the sisters could enjoy. Hence it appears, says the Mitakshara, that daughters also participate after the death of their father. In fact they have become participators through the difficulty of

17. (1926) M.W.N. 73 at 76.

arranging their maintenance allotment: which is exactly the reverse of the appellant's theory that they are given a maintenance allotment because they never lost their right to be participators.

And this clearly explains why it makes all the difference whether the father is alive or dead. When he is alive the daughters are under his care and there is no question of participation. But when he is dead, and the brothers have to allot the maintenance, in working it out, the daughters become a *quasi* participator.

This theory also explains what otherwise is difficult to understand, why, if the daughter has had a right to share continuously from the earliest times it has degenerated (as the appellant concedes) into a right of maintenance. Along what path of thought or custom did it proceed until it degenerated into maintenance? I can understand its steadily dwindling, and being circumscribed in all manner of ways, but why if it had nothing to do with maintenance should it ever have fallen under that category? Is not the answer that the underlying idea has always been maintenance, and not participation? Maintenance when the father was alive; and then when his death had thrown his responsibilities upon the coparcenary, maintenance at first worked out in terms of a share, and then again treated simply as maintenance.

In this view of the case the assumption of the learned Subordinate Judge will be correct, and I am not prepared to disturb it. In respect to the other matters raised on appeal I entirely agree with Mr. Justice Ramesam, and have nothing to add. Only if my view on the main question had prevailed I should have allowed respondent his costs.

Reilly, J.

Reilly, J.—I do not think it is necessary for me to discuss at length the main question in this appeal, which has been dealt with in the judgments already pronounced. It is admitted that, while a Hindu family remains undivided, the expense of marrying all the daughters of the family, whichever member of the family is their father, falls upon the family funds. It is contended for the plaintiff that the explanation of that is that the expense naturally and properly falls upon each girl's father but, while he is undivided from the rest of the family, his personal obligation must be met from the family funds. That explanation appears to me to conflict with the conception of a joint family. As soon as a joint family widens beyond the descendants of one living head it becomes clear that the right

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of each member born into the family arises by birth into the family not by descent from one member of the family rather than another. This comes out clearly in the typical joint family of Malabar Law, where no individual has a right to claim partition. Every member must be the child of a woman of the family, but the right to maintenance and the extent of that right has no relation to the fact that the member is the child of one woman rather than another. The special claim of a child on its parent to care and support is a matter of human instinct, which may have left its trace on every system of law; but it has essentially no place in the joint family system. If we find that in an undivided Hindu family the girls have to be married at the expense of the family, I do not think we are justified in inventing for that natural and logical feature of the joint family system any explanation other than that it is part of that system. To say that in such circumstances the obligation on the whole family to meet the marriage expenses of the girls is due to the fact that they are daughters of a member of the joint family and not due to the fact that they are themselves members of the family appears to me to confound the explanation how they come to have a claim on the joint family funds with the nature of the claim itself. In this case we are concerned with the question on whom the claim falls when a son with sisters demands partition while his father is alive. But it has been pointed out and admitted that, if after their father dies his sons make a partition, they must provide for the marriage expenses of their sisters as if it were an obligation of the joint family. In explanation of that it is suggested for the plaintiff that, if in his life the obligation had been primarily that of the father, then, as his interest in the joint-family property lapsed to the sons on his death, the obligation came upon them with it. Apart from that explanation being in my opinion in conflict with the conception of a joint family it is almost impossible to reconcile the explanation with the fact that ancient Hindu Law specified a definite share, described as a fourth, as that of the sister in such a partition after her father's death. By whatever method such a fourth was to be calculated—and about that there were many differences of opinion—no method could bring it into any settled proportion to the interest of the father which had lapsed to the sons on his death. The fact that a fourth was ever specified for the sister's share in such circumstances indicates the idea that her right was her own by birth in consonance with the joint-family system and not merely a right as daughter of a deceased coparcener, whose death had benefited the surviving coparceners.

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Then is there any binding authority which drives us to treat the daughter of a coparcener not as a member of the joint family with a claim for her marriage expenses on the family funds to be distributed as such on a partition in her father's life, but as having a claim only on her father and on his share in such a partition? What the plaintiff relies on is Chap. I, VII, 14 of the Mitakshara. But, if that passage refers to partition in the father's life at all, which appears to me open to some doubt, it may well mean no more than that at such a partition she must be content with the provision he thinks fit to make. As the passage says "there is no special precept respecting this case"—in contrast with the special precept that in a partition after her father's death she is to have a fourth. The statement in Mayne, S. 482, that, when a partition is made in the father's life, he is bound to maintain his daughter and pay her marriage expenses is based only on this passage in the Mitakshara, which is open to another interpretation. The statement quoted from Strange's Hindu Law—"Daughters take nothing as of right during their father's life"—appears to be the learned author's inference from the same passage. I agree with Ramesam, J., that there is nothing in Chap. I, VII, 14 of the Mitakshara which necessarily supports the view that the daughter's claim is only on her father and not directly on the joint family.

If there is no compelling authority to support the plaintiff's view of this matter, then the obligation to maintain, and pay for the marriage of, a daughter should fall on the whole joint family and be so provided for at partition even in her father's life, as would be the maintenance of a disqualified son. But there is one recognised feature of partitions which is at first sight incompatible with this view and has caused me some doubt. If a joint family consists of a man and his children and his sons' children, then the maintenance and the marriage expenses of his daughters and his sons' daughters alike fall on the joint family. But if there is a partition between him and his sons, it is admitted that the maintenance and marriage expenses of his sons' daughters thereafter fall upon the branch joint families headed by his respective sons Is that because the grand-daughters after all are primarily dependent on their fathers? If so, why are not the daughters primarily dependent on their father? With great respect I doubt whether any analogy drawn from the son's debts and the father's debts is of much assistance to us in this connection. So long as the whole family is joint the claims for maintenance and marriage expenses of both the grand-daughters

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and the daughters fall on the joint-family funds; but the liability of the joint-family funds for the debts of the sons and of their father is not the same. On consideration the explanation of the fact that after a partition between a father and his sons the claims of the sons' daughters for maintenance and marriage expenses are on the shares of the respective sons only appears to me to be that, while a girl is a member of a joint family, her claim for such expenses can be only on the joint family to which at the time she belongs: when a son who has a daughter is divided from his father, he becomes at once the head of a new branch joint family even if he has not yet begotten or adopted a son: it is on that joint family and its property that his daughter's claim must fall. But, when sons divide from their father, their sisters do not remain members of a joint family with their father, either a remnant of the old joint family or a new joint family which comes into being on the partition; the old joint family, so far as the generation of the sons and their sisters is concerned, has gone, and, though the father may beget new children and so become the head of a new joint family, his daughters living at the time of the partition are not members of that joint family. If that is the correct view, then the fact that on a partition between a father and his sons the maintenance and marriage expenses of the sons' daughters fall on the respective sons' branches alone, as do the expenses of the sons' sons, and not on all who were coparceners in the old joint family, is not inconsistent with similar claims of the sons' sisters falling on all who were coparceners of old joint family. If one of several sons alone divides from his father and brothers, then his sisters remain members of the joint family of his father and his remaining brothers; but in that case the son who goes out by division would not escape liability for his share of his sisters' maintenance and marriage expenses.

I agree therefore with Ramesam, J., that on partition between a father and his sons the sons remain liable for the marriage expenses of their sisters in proportion to their shares of the property divided. As mentioned in *Vaikunthatam Ammangar* v. *Kallapiran Aiyangar*[3] it has been a common practice in this Presidency to provide in partition decrees for the marriage expenses of daughters out of the family funds. Of that practice we all, I think, have knowledge, and in the District Munsif's Court the plaintiff himself did not object to it being followed in this case It may not be appropriate to fix a definite sum for

3. (1900) I.L.R 23 M. 512 10 M L.J. 111

marriage expenses years before a marriage takes place; but the recognition in the practice that the claim for such expenditure is one which must be met from the funds of the joint family and not by the father alone after partition is in my opinion in accordance with the law. I agree that this matter is not affected by the decision of their Lordships of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi*.[1]

On the other points in the case also I agree with the judgment of Ramesam, J.

N.S. *Decree of the Lower Court modified.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD CARSON, SIR GEORGE LOWNDES AND SIR BINOD MITTER.

The Midnapur Zamindary Company, Ltd. .. *Appellants**

v.

The Secretary of State for India in Council .. *Respondent.*

Civil Procedure Code (V of 1908), S 100—Finding of fact—Interference with—Jurisdiction—Bengal Tenancy Act, Ss. 103-B, 104-H, 111-A—Tenant—Tenure-holder or raiyat—Test—Entry in record of rights as tenure-holder—Presumption from—Evidence rebutting—Suit for declaration that entry is erroneous and that tenant is really occupancy raiyat—Maintainability—Limitation—Limitation Act, Art 120—Applicability—Regulation No VII of 1882—Settlement records prepared under—Admissibility in evidence against Secretary of State—Value of.

No second appeal lies on the ground that the First Appellate Court came to an erroneous finding of fact. The only question which the High Court can consider in Second Appeal is whether the First Appellate Court had before it any evidence proper for its consideration in support of its finding. If it had evidence proper for its findings notwithstanding statutory presumptions applicable to the case its findings of fact are final and conclusive.

A suit by a tenant for a declaration that the entry in the record of rights to the effect that he was a tenure holder was incorrect and that he was really an occupancy raiyat comes within the proviso to S. 111-A of the Bengal Tenancy Act, and not within the purview of S. 104-H of that Act, and the period of limitation applicable to such a suit is that provided by Art. 120 of the Limitation Act, and not that provided by S 104-H of the Tenancy Act.

The real test, whether a holding is a tenure or raiyati, depends upon the purpose for which the holding was acquired.

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*P.C. Appeal No. 11 of 1926. 29th July, 1929.

1. (1922) L.R. 49 I.A. 168: I.L.R. 45 M. 489: 43 M.L.J. 428 (P.C.).

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Held, on the evidence, reversing the High Court and restoring the District Judge, that, notwithstanding the entry in the record of rights finally published on 2nd April, 1915, to the effect that the appellants were tenure holders, the appellants were really occupancy raiyats and not tenure holders.

Settlement records prepared under Regulation VII of 1882, although they may not have the same evidentiary value as the settlement records prepared under the Bengal Tenancy Act, are evidence against the Secretary of State for India in Council.

Appeal No. 11 of 1926 against a decree of the High Court, Calcutta (Sanderson, C.J. and Chotzner, J.), dated the 4th August, 1924, which reversed a decree of the District Judge of Murshidabad, dated the 9th December, 1921, and restored a decree of the Subordinate Judge of Murshidabad, dated the 28th March, 1919.

The questions for determination on the present appeal were whether the appellants were occupancy tenants or tenure holders of the land in suit, and whether the suit was maintainable having regard to the provisions of the Bengal Tenancy Act.

De Gruyther, K.C. and *Raikes* for appellants.

Dunne, K.C. and *K. Brown* for respondent.

29th July, 1929. Their Lordships' judgment was delivered by

Sir Binod Mitter.

SIR BINOD MITTER.—This is an appeal from the judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 4th August, 1924, which reversed the decree of the 9th December, 1921, and restored the decree of the Subordinate Judge of Murshidabad, dated the 28th March, 1919.

The questions for determination in the suit out of which the present appeal arises were (1) whether the appellants are raiyats or tenure holders of a certain holding in Chur Narainpur consisting of about 800 bighas, (2) whether the suit comes within the purview of section 104-H or the proviso to 111-A of the Bengal Tenancy Act, and (3) whether the suit is within time having regard to the law of limitation under section 104-H of the same Act.

The Subordinate Judge held that the appellants have not proved that the entry in the record of rights finally published on the 2nd April, 1915, to the effect that the appellants are tenure holders is incorrect and he further held that the plaintiffs' suit is not maintainable under the provisions of section 111-A and that the same is barred under section 104-H as it was not brought within six months from the date of the certificate of the final publication of the record of rights.

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From the decision of the Subordinate Judge there was an appeal to the District Judge of Murshidabad, who held that the appellants were occupancy raiyats and not tenure holders, and he further held that the suit was maintainable under S. 111-A and was not barred by limitation.

From this decision there was a second appeal to the High Court and that Court held that there was no reliable evidence to justify the District Judge's conclusion that the original purpose for which the tenancy was created was for cultivation.

The High Court further held, that the onus of showing that the entry in the record of rights is not correct, was upon the appellants and that there was no evidence to justify the finding that they have discharged the onus. The High Court did not decide any other points involved in the case.

Their Lordships have to observe at the outset that no second appeal lies on the ground that the District Judge came to an erroneous finding of fact. The only question which the High Court could consider was whether the District Judge had before him any evidence proper for his consideration in support of his finding. Section 100 of the Code of Civil Procedure, being Act No. 5 of 1908, corresponds with section 584 of the Civil Procedure Code of 1882. The construction of section 584 of the Civil Procedure Code of 1882 has often been considered by the Board. In *Durga Choudhrain* v. *Jawahir Singh Choudhri*[1] the Board said:

> "It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

In *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani*[2] the Board laid down the law to the same effect:

> "It was in the opinion of their Lordships within their jurisdiction (that is to say within the jurisdiction of the Judges on a second appeal) to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge."

The learned District Judge in his judgment held, (1) that the holding in question was acquired for the purpose of cultiva-

1 (1890) L.R. 17 I.A. 122 at 127: I.L.R. 18 C 23 (P.C.)
2. (1887) L.R. 14 I.A. 101 at 110. I.L.R. 14 C 740 (P.C.).

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tion of indigo by hired labour; (2) that the Ijara of 1840 could not be rightly regarded as the origin of the holding, and that the origin was unknown, and from these findings of fact he came to the conclusion that the entry in the record of rights was wrong and that the appellants were occupancy raiyats.

It seems to their Lordships that the real test, whether a holding is a tenure or raiyati, depends upon the purpose for which the holding was acquired.

The respondent relied on section 103-B, clause (3) and section 5, clause (5) of the Bengal Tenancy Act. Their Lordships have no reason to doubt that in coming to his findings of fact the learned District Judge did give proper weight to the entry in the record of rights to which it is entitled under section 103-B. He has expressly referred to the statutory presumption under section 5, clause (5). If he had evidence proper for his findings notwithstanding the statutory presumptions then it seems to their Lordships that his findings of fact were final and conclusive. (See *Kumeda Prosunna Bhuiya* v. *Secretary of State*[3].)

Their Lordships will now consider whether there was before the learned District Judge evidence proper for his finding.

It appears that the Menasakkans to whom the holding originally belonged conveyed their interest in 1873 to Jagendra Roy and others who in their turn sold in 1887 to Messrs. Louis Payen & Co. Louis Payen & Co. sold their interest in the holding to the appellants in 1913. It is a fact worthy of consideration, that in the present suit the Zamindars or proprietors under whom the appellants hold, and also the sub-tenants under them, admitted that the appellants are occupancy raiyats. It appears from the final settlement report of 1890 that occupancy holdings in the *mehal* in which Chur Narainpur is situate are by local custom transferable. Chur Narainpur has been assessed to revenue from time to time by the Government. The appellants drew their Lordships' attention to the Rubokaris of the 27th March, 1851, the 23rd February, 1861 and the 15th March, 1871, and the other papers prepared for purposes of such settlements. These settlements were for ten years respectively. The settlement of 1871 expired on the 31st March, 1880, but was extended to the 31st March, 1890. From these settlement records including the Rubokaris it appears that the only tenants cultivating the land were Baldev Saha, Ram Prasad and Beni Prasad Hazari (who were also the Zamindars of the *mouza*) and

3 (1914) 19 C.W.N. 1017.

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the Menasakkans. The Zamindars were growing *dofasli* crops, and the Menasakkans were cultivating indigo These settlement records were prepared under Regulation VII of 1882, and although they may not have the same evidentiary value as the settlement records prepared under the Bengal Tenancy Act, still in their Lordships' opinion they are evidence against the Secretary of State for India in Council.

Mr. De Gruyther has drawn their Lordships' attention also to certain *ekrars* executed by the tenants in favour of Louis Payen & Co., as also to the account books ranging from 1887 to 1901. These account books show clearly that at any rate indigo was being cultivated on a portion of the land in question by Louis Payen & Co. through hired labourers.

Suits had been instituted upon the *ekrars,* given by the various *jotedars* or tenants under Louis Payen & Co. and the tenants contested these suits on the allegation that these *ekrars* in which Louis Payen & Co. were acknowledged to be occupancy raiyats were taken by force, but these *ekrars* were held to be valid.

It is not necessary to go into further detail as regards the evidence, but their Lordships are satisfied after a careful examination of the record, that there was evidence before the learned District Judge proper for his finding. The learned District Judge did not discuss in detail the various settlement records and other evidence, oral and documentary, to which their Lordships' attention has been drawn, but their Lordships have no reason to doubt that the learned District Judge fully considered them.

Having regard to the practice of the High Court in second appeals it seems probable that the full record of the case which was laid before their Lordships was not placed before the learned Judges of the High Court.

The two other points that their Lordships have to decide are whether the suit is maintainable and whether the same is barred by limitation. The identical points came up for decision in the case of *Raja Promoda Nath Roy* v. *Asimuddin Mandal,*[4] and the High Court decided that a suit like the present would come within the proviso to section 111-A of the Bengal Tenancy Act, and that the period of limitation applicable to such suits was that provided by Art. 120 of the Limitation Act.

Their Lordships concur in this decision and the reasons given in its support by Mr. Justice Chatterjee.

4. (1911) 15 C.W.N. 896.

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For the reasons aforesaid, their Lordships are of opinion that the appeal should be allowed, the decree of the High Court set aside, and the decree of the District Court restored, with costs in all the Courts, and they will humbly advise His Majesty accordingly.

The respondent will pay the costs of this appeal.

Solicitors for appellants: *Burton Yeates & Hart.*

Solicitor for respondent: *Solicitor, India Office.*

K.J.R. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR, MR. JUSTICE CURGENVEN AND MR. JUSTICE PAKENHAM WALSH.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Pl. S. Sivaswami Chettiar .. *Assessee (Respdt.).*

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The Commissioner of Income-tax, Madras v. Sivaswami Chettiar.

Income-tax Act (XI of 1922), Ss. 23 (2) and 22 (4)—Combined notice under—Validity of—Non-compliance with terms of—Assessment under S. 23 (4) on—Justifiability of—S 22 (2)—Return submitted under—Notice under S. 22 (4) in case of—Validity of—Non-compliance of terms of—Assessment under S. 23 (4) in case of—Justifiability of

A combined notice under Ss 23 (2) and 22 (4) of the Income-tax Act of 1922 is a valid notice, and, on non-compliance of the terms thereof, an assessment under S. 23 (4) of the Act is justified.

In respect of an assessee who has submitted a return of his income under S. 22 (2) of the Act, a notice issued under S. 22 (4) is valid so as to justify an assessment under S. 23 (4) in the event of non-compliance of the terms of the notice.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under section 66 (2) of the Indian Income-tax Act (XI of 1922).

2. The petitioner, Rm. Pl. S. Sivaswami Chettiar, a banker, who is a resident of Pudukotta State, carries on business in British India his principal place of business being Coimbatore within the jurisdiction of the Income-tax Officer, Coimbatore Circle.

3. For the assessment of the year 1927-28 the Income-tax Officer, Coimbatore, sent him a notice under section 22 (2) of the Income-tax Act requiring him to furnish a return of his income during the year ending the 31st March, 1927. A return signed

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*O.P. No 121 of 1929. 17th October, 1929.

by one "Rm. Pl. S. Tirupathi Mudaliar" showing a net income of Rs. 6,771-11-9 from business was filed before the Income-tax Officer. No evidence accompanied the return to show that Tirupathi Mudaliar had authority to submit the return on the petitioner's behalf. The Income-tax Officer accordingly returned the form to the petitioner directing him to re-submit it after affixing his signature to the verification in the return. The return was not re-submitted and the Income-tax Officer made the assessment under section 23 (4) of the Income-tax Act on the ground that the petitioner had failed to make a return. About three weeks later the petitioner filed again the return signed by Tirupathi Mudaliar and at the same time applied to the Income-tax Officer under section 27 for a re-opening of the assessment, but without success. He then appealed to the Assistant Commissioner and contended that the return submitted by his representative was a legal and valid return. The Assistant Commissioner set aside the assessment and directed the Income-tax Officer to make a fresh assessment on the basis of the return made by the representative.

4. On receipt of the Assistant Commissioner's order the Income-tax Officer called on the petitioner under section 23 (2) of the Income-tax Act to adduce evidence in support of his return. One Rm. Pl. S. Sitarama Aiyar (whom the petitioner acknowledged at a subsequent enquiry as his authorised representative) applied for a week's time as he had written to his principal in the Pudukotta State for some of the accounts of the business which were then with him. This was granted. On the adjourned date one Rm. Pl. S. Chockalingam Chettiar (whom also the petitioner acknowledged at the enquiry referred to above as his authorised representative) produced some of the accounts and put in a "revised written statement" showing a net income of Rs. 25,272. The Income-tax Officer found that certain old accounts relating to one of the businesses carried on by the petitioner, *viz*, the business at Sulur had not been produced. He accordingly directed the representative to produce those accounts and adjourned the case to the 29th November, 1927. Mr. Sitarama Aiyar referred to above appeared on that date with the "old accounts" called for and submitted another "revised written statement" asking that a certain amount of loss said to have been incurred in the old accounts of the Sulur business should be deducted from the amount shown in the first "revised written statement" submitted by the other representative Chockalingam Chettiar. The Income-tax Officer examined the accounts and found that the old account disclosed a profit of Rs. 11,709.

5. In the course of the further enquiries made by him the Income-tax Officer had reason to believe that the petitioner maintained a set of accounts in which a portion of the profits derived by him was shown and the production of which he had been evading. He therefore issued to the petitioner a notice in Form No. 86

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(a combined notice under sections 22 (4) and 23 (2) of the Income-tax Act) directing him to appear before him and produce certain specified accounts, *viz.*, the accounts in which certain money-lending and other transactions detailed by the Income-tax Officer in the notice were recorded. An attempt was made to serve this notice on the petitioner in person but as the petitioner could not be found the notice was affixed to the door of the business premises. From his previous experience of the petitioner's attitude however the Income-tax Officer was of opinion that it was desirable to effect a clearer service of the notice and he accordingly sent another notice in the same terms by registered post. This was acknowledged by Mr. Sitarama Aiyar referred to above. In response to this notice the petitioner appeared through his vakil but did not produce the particular accounts in which the transactions referred to by the Income-tax Officer were recorded. When questioned about them the vakil stated that he could not explain anything as Sitarama Aiyar, the petitioner's agent (the agent who had acknowledged the notice) was away. The Income-tax Officer did not believe the statement about the agent's absence. And in any case it was clear that the petitioner had failed to comply with the terms of the notice issued to him under sections 23 (2) and 22 (4). The Income-tax Officer accordingly assessed him under S. 23 (4).

6. The petitioner applied to the Income-tax Officer under section 27 of the Income-tax Act to re-open the assessment and contended that he did not maintain any accounts recording the transactions referred to by the Income-tax Officer in his notice under S. 22 (4), and that there was therefore no failure on his part to comply with the terms of that notice. The Income-tax Officer refused to believe in the petitioner's statement and dismissed the application. A copy of his order is enclosed marked Ex. A. (Though it is not perhaps strictly relevant it may be mentioned here that the petitioner produced in the course of the assessment for the subsequent year, *viz.*, the year 1928-29, the very accounts the existence of which he had denied in his application to the Income-tax Officer referred to above.)

7. Against the order of the Income-tax Officer under S. 27 the petitioner appealed to the Assistant Commissioner but without success. A copy of the Assistant Commissioner's order is filed marked Ex. B.

8. The petitioner now requires me to state a case and refer for the decision of the High Court the following questions:—

(i) "Whether a combined notice under sections 23 (2) and 22 (4) is a valid notice, and whether on a non-compliance of the terms of such a notice, an assessment under section 23 (4) could be justified? and

(ii) "Whether in respect of an assessee who has submitted a return of his income under section 22 (2), a notice issued under section 22 (4)

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is valid so as to justify an assessment under section 23 (4) in the event of non-compliance of the terms of the notice."

9. My opinion thereon is as follows:—

Question 1.—The petitioner's argument is that the notice is invalid because it called on him to appear before the Income-tax Officer on a certain date *and to produce* certain accounts specified therein while a notice under S. 23 (2) could only direct him to appear before the Income-tax Officer *or* to produce the evidence which he had in support of the return. The answer to this argument, as the Assistant Commissioner has pointed out in his order, is that there is nothing in the Act preventing an Income-tax Officer from requiring an assessee under S. 23 (2) to be present before him and at the same time requiring him under S. 22 (4) to produce any specified accounts or documents.

As regards a combination of the two requirements in one notice the validity of such a notice was the subject-matter of a decision by a Full Bench of the Calcutta High Court in the case of *In re Harmukhrai Dulichand*[1] and Rankin, C.J., in the course of his judgment observed:

"The first question is whether there is anything illegal in the issue of a notice under S. 23 (2) and S. 22 (4). I am of opinion that there is no reason why these two notices should not be comprised in one document. The position is that the assessee is given one date on which he is first of all to produce certain accounts or documents required by the Income-tax Officer and he is also told that on that same date he will get an opportunity of producing any further evidence upon which he relies. I can see no objection at all to this procedure and I observe that in the case cited to us from the Allahabad High Court decided on the 4th January of this year [*In the matter of Chandra Sen Jain, Vaid, Etawah*[2]] a Division Bench of that Court was of the same opinion. In my judgment there is no difficulty upon the answer to the first question."

I would respectfully adopt this reasoning and answer the question propounded in the affirmative.

Question 2.—A similar question was answered in the affirmative in the case of *Rm. S. Rm. Ramaswami Chettiar* v. *Commissioner of Income-tax, Madras*[3] (O.P. No. 188 of 1928) by a Full Bench of the Madras High Court consisting of the Chief Justice, Mr. Justice Beasley and Mr. Justice Reilly.

For the reason contained in their Lordships' judgment I would answer this question also in the affirmative.

K. V. Krishnaswami Aiyar, V. Rajagopala Aiyar and *T. V. Ramiah* for assessee.

M. Patanjali Sastri for Commissioner of Income-tax, Madras.

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1. (1928) I.L.R. 56 C 39 (F.B.)
2. (1928) I.L.R. 50 A. 589.
3. (1928) I.L.R. 52 M 194: 56 M.L.J. 141 (F.B).

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Kumaraswami Sastri, J.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.—Two points referred to us for decision are: (1) whether a combined notice under Ss. 23 (2) and 22 (4) is a valid notice, and whether on a non-compliance of the terms of such a notice, an assessment under S. 23 (4) could be justified? and (2) whether in respect of an assessee who has submitted a return of his income under S. 22 (2), a notice issued under section 22 (4) is valid so as to justify an assessment under section 23 (4) in the event of non-compliance of the terms of the notice?

As regards the first point we think it is covered by authority. That a combined notice may be sent has been held in *In re Harmukhrai Dulichand*,[1] *In the matter of Chandra Sen Jaini*,[2] *Commissioner of Income-tax, Burma* v. *R. M. P. Chettiar Firm*[4] and *Ram Kissendas Bagri* v. *The Commissioner of Income-tax, Bengal.*[5]

The second question has, we think, been practically answered in *Ramaswami Chettiar* v. *Commissioner of Income-tax.*[3] If a combined notice can be issued, there is nothing to prevent the Income-tax Officer from sending a notice, as he has done, in Form B, requiring the production of accounts which he wants to be produced and are specified on the back of his notice and also requiring the person to appear personally. Now, in cases where a person appears but does not produce the accounts he is asked to produce, we think the penalty under section 23 (4) can be applied. It is not necessary that another notice should be sent under section 23 (2) because under section 23 (4) any one of the defaults is sufficient to attract the provision that the Income-tax Officer can assess on the best of his information. The argument of Mr. Krishnaswami Aiyar, as we take it, is, where a return has been submitted and even in cases where the Income-tax Officer acts under section 22 (4) and wants the production of accounts, he must still issue a notice under S. 23 (2) and act after issuing that notice. That is reading into S. 23 (4) what is not there. An Income-tax Officer is not bound to make up his mind the moment he receives a return as to whether he accepts it or not; it is open to him before he deals with the question to call for the production of accounts and, as the accounts

1. (1928) I.L.R. 56 C. 39 (F.B.) 2. (1928) I.L.R. 50 A. 589.
3. (1928) I.L.R. 52 M 194 at 202. 56 M.L.J. 141 (F.B.).
4. (1929) I.L.R. 7 Rang. 26. 5. (1927) 2 I.T.C. 324 (F.B.).

have to be proved by somebody, to call the assessee to appear in person. If the assessee appears in person but does not produce the accounts there is no reason to say that the penalty under section 23 (4) is not attracted simply because another notice has not been sent under section 23 (2) asking him to attend office and produce or cause to be produced any records which he may rely on in support of his return. This would pre-suppose that the Income-tax Officer must work up his mind at once one way or the other and then act and that he cannot suspend judgment until he calls for the person assessed to substantiate his return or calls for the accounts to substantiate his evidence.

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We think both these questions have to be answered against the petitioner that a combined notice is valid and that an assessee can be assessed under section 23 (4) in the event of non-compliance with the terms of the notice requiring the production of accounts which the officer in law entitled to call upon him to produce. The petitioner will pay the costs of the reference, Rs. 250.

A.S.V. *Questions answered in the affirmative.*

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